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EDITOR'S NOTE

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(1)

No. 86-1329-CFX
Status: GRANTED

Title: Gulfstream Aerospace Corporation, Petitioner
v.
Mayacamas Corporation

Docketed:
February 12, 1987

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Bien,Elliot L.

Counsel for respondent: Pooley,James H., Ward,Gregory H.

Entry	Date	Note	Proceedings and Orders
1	Feb 12 1987	G	Petition for writ of certiorari filed.
2	Feb 17 1987		Application for stay, filed, and order denying same by O'Connor, J., on Feb. 17, 1987.
3	Feb 20 1987		Appendix of petitioner Gulfstream Aerospace Corp. filed.
4	Mar 18 1987		DISTRIBUTED. April 3, 1987
5	Apr 1 1987	F	Response requested -- [JUS].
6	May 1 1987		Brief of respondent Mayacamas Corp. in opposition filed.
7	May 6 1987		REDISTRIBUTED. May 21, 1987
8	May 6 1987		REDISTRIBUTED. May 21, 1987
8	May 6 1987		REDISTRIBUTED. May 21, 1987
9	May 6 1987		REDISTRIBUTED. May 21, 1987
10	May 14 1987	X	Reply brief of petitioner Gulfstream Aerospace Corp. filed.
12	May 26 1987		Petition GRANTED.
			**********
14	Jun 9 1987		Application for stay filed (A-894).
16	Jun 9 1987	D	Motion of petitioner to expedite oral argument filed.
15	Jun 10 1987		Response requested -- Due Monday, June 15, 1987 COB. (A-894).
18	Jun 15 1987		Opposition to apaplication for stay filed.
17	Jun 22 1987		Motion of petitioner to expedite oral argument DENIED. The application for stay presented to Justice O'Connor and by her referred to the Court is denied.
19	Jul 8 1987		Joint appendix filed.
20	Jul 10 1987		Brief of petitioner Gulfstream Aerospace Corp. filed.
21	Aug 13 1987		Brief of respondent Mayacamas Corp. filed.
22	Aug 14 1987		Record filed.
23	Oct 9 1987		CIRCULATED.
24	Oct 9 1987		SET FOR ARGUMENT. Monday, December 7, 1987. (3rd case).
25	Nov 23 1987	X	Reply brief of petitioner Gulfstream Aerospace Corp. filed.
26	Dec 7 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 - 1329

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

GULFSTREAM AEROSPACE CORPORATION,
a Georgia corporation,
Petitioner,

VS.

MAYACAMAS CORPORATION,
a California corporation
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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85 1?

QUESTIONS PRESENTED

A. Does *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), compel a stay, if not a dismissal, of a duplicative federal diversity lawsuit, where the federal plaintiff was the defendant in an identical and prior pending state court action; where it had a plain right to a federal forum by removing the diverse state action under 28 U.S.C. § 1441(b); where it would thus have avoided two identical suits, and undesirable federal/state conflicts; where its prescribed federal forum was a local one, in Georgia, pursuant to 28 U.S.C. § 1441(a); and where it frustrated the intent of both the removal statutes and the federal transfer rules, 28 U.S.C. § 1404 *et seq.*, by filing its duplicative federal action in the distant venue of California?

B. Is an order refusing to stay or dismiss such a federal lawsuit appealable under either the *Enelow/Ettelson* doctrine, as the denial of an equitable stay, or under the *Cohen* "collateral order" doctrine, on the same rationale recently held applicable to orders *granting* such a stay in *Moses H. Cone Memorial Hospital v. Mercury Constr.*, 460 U.S. 1, 11-13 (1983)?

C. Given the serious potential of mootness when a stay or dismissal is improperly denied in this type of case, did the Ninth Circuit Court of Appeals err in denying petitioner's request for a stay pending an expedited review of the *Colorado River* issue?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PARTIES

The only parties to the proceeding below are those noted on the caption to this petition.

OPINION BELOW

The opinion below is reprinted in the Appendix. Although certified for publication in the official reports under Ninth Circuit Rule 21, no reporter citation is yet available.

SUPREME COURT JURISDICTION

The opinion of the Court of Appeals was filed on December 19, 1986, and corrected in a minor respect on January 16, 1987. No petition for rehearing has been filed. Jurisdiction for this petition is conferred by 28 U.S.C. § 1254(a).

STATUTES INVOLVED

(1) *28 U.S.C. § 1441(a) and (b)*

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(2) *28 U.S.C. § 1404(a)*

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

Petitioner, Gulfstream Aerospace Corporation ("Gulfstream"), contracted in 1983 (E.R. 58) to build an aircraft for the respondent, Mayacamas Corporation ("Mayacamas"). Gulfstream's plant is in Georgia, delivery was to be in Georgia (E.R. 59), and the parties agreed to let Georgia law govern any disputes. (E.R. 76) Gulfstream is a Georgia corporation, and Mayacamas a California corporation. (E.R. 12)

In August 1985, Mayacamas refused to make a $673,500 progress payment stipulated by the contract, and demanded its deposit back, claiming that Gulfstream had frustrated Mayacamas' alleged purpose in the transaction. (E.R. 81) Gulfstream thereupon filed a one-count breach of contract action against Mayacamas on October 9, 1985, in the Superior Court of Chatham County, Georgia. (E.R. 53 & 88)

It was undisputed below that Mayacamas and Gulfstream have diverse citizenship; that original federal subject matter jurisdiction would have been available as to the Georgia action under 28 U.S.C. § 1332; and that Mayacamas, the sole defendant in Gulfstream's action, would have had the right to remove it pursuant to 28 U.S.C. § 1441(b) because "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Mayacamas, however, never attempted to remove Gulfstream's action. The thirty-day deadline of 28 U.S.C. § 1446(b) expired no later than December 1, 1985, (E.R. 88)

Instead, on November 1, 1985, Mayacamas filed an action against Gulfstream, and no other parties, in the United States District Court for the Northern District of California. (E.R. 12) Although it pleaded four causes of action, Mayacamas simply asserted four different state-law theories of liability in connection with precisely the same contract, and the same dispute, involved in Gulfstream's prior action in Georgia.

Indeed, on December 13, 1985, Mayacamas filed a four-count counterclaim in the Georgia state action. (E.R. 22) This pleading curiously resembled Mayacamas' four-count diversity complaint in the Northern District of California. (Compare E.R. 12) It was manifestly a compulsory counterclaim.

Gulfstream promptly moved on November 29, 1985, for a stay or dismissal of the federal action under the *Colorado River* doctrine. (E.R. 29) After briefing and oral argument, the district court denied any relief by order filed on February 21, 1986. (E.R. 211) It concluded that "[T]his Court must exercise its jurisdiction . . . , [even though] this federal diversity case may be duplicative of the state court litigation . . . . " (E.R. 211-212)

Gulfstream filed a notice of appeal on March 20, 1986 (E.R. 1), together with its transcript notice under Federal Rules of Appellate Procedure, Rule 10(b). (E.R. 4) Four days later, on March 24, 1986, it filed a motion for expedited briefing, and for a stay of the district court proceedings pending the outcome. (See the accompanying application for a stay under Supreme Court Rule 44)

Gulfstream's motion noted a split among the Circuits as to the appealability of the district court's order. Accordingly, Gulfstream requested the Ninth Circuit, if it rejected appealability, to entertain and resolve the *Colorado River* question by treating the notice of appeal as a petition for a writ of mandamus. The request for a temporary stay was sought on alternative bases, too, under Federal Rules of Civil Procedure, Rule 62(g), or 28 U.S.C. § 1651.

The Ninth Circuit did not respond until June 24, 1986. It agreed then to expedite the appeal, but denied Gulfstream's request for a stay in the interim. (See accompanying application) The oral argument was conducted on November 13, 1986.

On December 19, 1986, the Ninth Circuit issued an opinion dismissing the appeal. First, the court found the order nonappealable under either the *Enelow/Ettelson* or *Cohen* rationale. Then it declined to exercise its mandamus authority, and here reached the merits of the *Colorado River* issue. It found no abuse of discretion, no clear right to the writ, and "no serious hardship or prejudice" from this duplicative litigation. Although a dissenter found the order appealable under *Enelow/Ettelson,* citing the Seventh Circuit's holding in that regard, he concurred with the majority's view on the merits, that "It was well within the district court's discretion to deny the motion."

Thus, both the majority and the dissenter completely rejected Gulfstream's principal contention on the appeal, that a *Colorado River* stay was compelled in order to effectuate the Congressional intent embodied in the removal statutes. Indeed, that contention was not even mentioned, though its rejection was plain in the opinions' treatment of this case as a matter of ordinary discretion on an ordinary stay request.

ARGUMENT

A. FEDERAL LAWSUITS DUPLICATING PRIOR STATE LAWSUITS, AND CIRCUMVENTING THE REMOVAL STATUTES, RAISE SPECIAL AND IMPORTANT FEDERAL CONCERNS WARRANTING A GRANT OF CERTIORARI

Certiorari was granted in *Brillhart v. Excess Ins. Co. of America,* 316 U.S. 491 (1940), "[i]n view of the important question affecting the interrelationship of the state and federal courts in the administration of the Federal Declaratory Judgments Act . . . ." *Id.* at 494. In *Brillhart,* the Court held that federal declaratory relief suits should "ordinarily" defer to prior state court proceedings where the latter can competently adjudicate all issues raised by the parties:

> Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided. (*Id.* at 495)

Federal lawsuits like the instant one are just as duplicative and gratuitous as those criticized in *Brillhart.* However, they represent a far more serious affront to the "interrelationship of the state and federal courts." For their interference with the state courts is worse than unnecessary; it contravenes one of the nation's oldest devices for minimizing this very kind of interference, and its strains on the federal system.

Ever since the original Judiciary Act of 1789 (1 Stat. 73, § 12), Congress has provided a right of removal for state court defendants like Mayacamas, qualifying for a federal forum by the diversity of citizenship. *See, generally,* 1A *Moore's Federal Practice* (2nd ed. 1986), History of Removal, ¶ 0.156. But, from the start, removal has always meant that only one court, the federal court, would adjudicated the diverse parties' dispute. There would be no concurrent proceedings, with their inevitable frictions.

Moreover, the removal has always had to take place at the outset,[1] before the state court would involve itself significantly in the dispute. This, too, is a primary device for minimizing friction between two court systems.

Although duplicative federal suits in general have been treated by this Court in *Colorado River Water Conservation Dist. v. United States, supra,* 424 U.S. 800, and in a more recent case involving the Federal Arbitration Act, *Moses H. Cone Hospital v. Mercury Constr., supra,* 460 U.S. 1, the availability of removal raises a unique and important issue in this context, well warranting this Court's attention on certiorari. There is also a conflict among the Circuits on the issue, and even on the appealability of an order denying a stay under these circumstances. (See *post,* p. 8)

When, as here, a federal court plaintiff could have had a federal forum by removal, and thus avoided duplicative litigation *and* federal/state conflicts in the process, then the federal courts should carry out the intent of Congress by staying or dismissing the duplicative federal action. Here, as in *Colorado River* with the McCarran Act, the removal statutes have long pointed the way to a sensible and politically sound allocation of federal and state judicial resources. State court defendants like Mayacamas, who spurn their prescribed mode of access to the federal courts by removal, cannot be heard to complain when their unnecessary and duplicative federal suits are stayed or dismissed.

Just as in *Brillhart,* the removal statutes demand a strong presumption of deferral to prior state court litigation. When *Colorado River* and its progeny speak of "exceptional circumstances" being required for a federal court to defer to parallel state court proceedings, their premise is that litigants are presumptively entitled to the only federal forum Congress has provided for them. Even when there are no federal claims in the suit, in pure diversity cases like this one, the federal courts are

[1] There was one brief period during which removal could be effected until the time for trial. *See, Shamrock Oil & Gas Corp. v. Shets,* 313 U.S. 100, 106 (1941).

said to have a "virtually unflagging obligation" to exercise their jurisdiction when it is invoked in the only way possible.

However, the presumption against abstention should be reversed when a litigant *has* a federal forum available, by removal, but fails to take advantage of it. Such a litigant is in no position whatsoever to claim that a Congressionally mandated federal forum is being withheld. The only thing being withheld is a *disfavored* federal forum, when the favored one was fully available but declined. In this narrow and easily identified class of cases, state court defendants should presumptively be restricted to that status when they turn their backs on the federal removal forum Congress has prescribed for them. There should be a "virtually unflagging" inhospitality to their circumvention of removal, and invitation to federal/state conflicts.

A fortiori, the federal suit should be stayed or dismissed when, in addition to circumventing the removal statutes in general, the plaintiff also circumvents their explicit insistence on the *local* federal forum. 28 U.S.C. § 1441(a). If, for example, Mayacamas believed that California was a more convenient or otherwise appropriate place for trial than Georgia, the removal venue, its proper remedy lay under the transfer statutes, 28 U.S.C. § 1404 *et seq.* Choice of law, and all other aspects of a requested change in federal venue, would be guided by carefully developed principles, *e.g., Van Dusen v. Barrack,* 376 U.S. 612 (1964), not the whim of the state court defendant.

In sum, this case presents an important and novel question in this Court of Congressional and judicial policy. The Seventh Circuit, leading commentators and several lower courts have called for stays to combat duplicative federal suits, and specifically to avoid circumvention of the removal statutes. *E.g.,* Kurland, Toward a Cooperative Judicial Federalism, 24 F.R.D. 481 (1959); Currie, The Federal Courts and the American Law Institute (Pt.II), 36 U.Chi.L.R. 268, 335 (1969); Note, Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits, 60 Colum.L.R. 684, 704 (1960); Note, Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of *Colorado River,* 44 U.Chi.L.R. 641, 667-71 (1977); *Microsoftware Computer Systems, Inc. v. Ontel*

Corp., 686 F.2d 531, 537 (7th Cir. 1982); *Calvert Fire Ins. Co. v. Am. Mutual Reinsurance Co.*, 459 F.Supp. 859 (N.D. Ill., E.D. 1978), aff'd on other grounds, 600 F.2d 1228 (7th Cir. 1979); *Prudential Ins. Co. v. McDowell*, 570 F.Supp. 21 (W.D. Pa. 1983); *and see, Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 307 and fn. 5, 311 (1st Cir. 1986). The Ninth Circuit, however, has approached this case as nothing more than a review of ordinary discretion in ruling on a stay request.

For the reasons indicated, certiorari should be granted to resolve an important question for the administration of justice and federalism. This Court has already expressed tentative support for the Seventh Circuit's approach in a footnote in *Moses H. Cone Hospital, supra*, 460 U.S. 1, fn. 20 at 17. It should now make that support explicit, especially for the well defined class of duplicative federal suits circumventing the removal statutes.

B. CERTIORARI IS WARRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS OVER THIS ISSUE, EVEN AS TO THE APPEALABILITY OF THE TYPE OF ORDER IN QUESTION

There is a conflict among the Circuits over the application of *Colorado River* to this most egregious species of duplicative federal lawsuits. The conflict even extends to the basic question of the appealability of orders denying a *Colorado River* motion.

As indicated above, the Seventh Circuit has held that there is a *duty* to stay a suit like the instant one, where removal had been available. It accordingly reversed the order denying a stay. *Microsoftware Computer Systems, Inc. v. Ontel Corp., supra*, 686 F.2d 531. It found the order appealable under the *Enelow/Ettelson* doctrine where, as here also, an action at law was sought to be stayed on the essentially equitable grounds of *Colorado River*. However, the Seventh Circuit (*id.*, at p. 534) rejected appealability under the *Cohen* "collateral order" doctrine.

Now, the Ninth Circuit has rejected *both* theories of appealability. And, in approaching the issue as one of ordinary discretion, the Ninth Circuit has rejected the whole thrust of the

Microsoftware opinion on the merits: that a refusal to stay this type of duplicative litigation is presumptively erroneous, warranting the most assiduous attention of the federal appellate courts.

Several other Circuits had previously rejected appealability as well. *Jackson Brewing Company v. Clarke*, 303 F.2d 844 (5th Cir. 1962), *cert. denied*, 371 U.S. 891 (1962); *Andrews v. Southern Discount Co. of Georgia*, 662 F.2d 722 (11th Cir. 1981); *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068 (3d Cir. 1983) (also rejecting mandamus) But *Gold* rejected *Enelow/Ettelson* appealability without even discussing the extensive *Microsoftware* analysis under that doctrine, and none of these cases, *Microsoftware* included, gave the *Cohen* "collateral order" doctrine the serious look this Court's *Moses H. Cone Hospital* decision now requires.

In *Moses H. Cone Hospital, supra*, 460 U.S. 1, this Court found that there was appellate jurisdiction following an order granting a *Colorado River* stay. *Id.* at 8-13. Notably, though, the opinion of the Court bases that determination on two independent grounds: effective finality, *id.* at 8-10, *and* the *Cohen* "collateral order" doctrine. *Id.* at 11-13. Clearly, the *Cohen* rationale also embraces orders denying a stay, while the finality rationale would only apply to the granting of a stay.

The Ninth Circuit's opinion below holds that *Cohen* appealability will not even be considered unless "the district court's erroneous decision will deprive [the litigant] of some protected interest." (Opinion, p. 5) This concept has ominous implications for needed appellate review of other significant kinds of interlocutory orders, as well. Reasoning that Gulfstream "has no right to have this federal action stayed or dismissed," (*id.*) the opinion states that "we do not *reach* the *Cohen* test, and we find the order nonappealable." (*Id.*, emphasis added) The opinion distinguishes cases involving double jeopardy or other substantive immunities.

Erecting a threshold "protected interest" barrier before even reaching *Cohen* is, among other things, contrary to *Moses H. Cone Hospital*. There is no mention there of such a barrier, only the traditional, tripartite *Cohen* test. And if there is indeed any such barrier, *Moses H. Cone Hospital* implicitly finds it sur-

mounted by the important concerns of a *Colorado River* stay motion, or the traditional *Cohen* test would not even have been reached in the opinion. Certiorari is appropriate to clarify the continuing integrity of the *Cohen* doctrine in general.

In this particular case, though, the Ninth Circuit's "protected interest" barrier must be deemed satisfied or superseded by the demands of Congress. Although the opinion below does not even discuss Gulfstream's analysis of Congressional intent in the removal statutes, here again the opinion rejects it, summarily finding no "right" or "protected interest" under a statutory scheme dating back to the original Judiciary Act.

In a footnote (at p. 5, fn. 3), the Ninth Circuit states that the *Cohen* test is not met anyway. Specifically:

> The denial of a stay does not conclusively determine the issue. The district court may reopen the order and consider a stay if the *Colorado River* factors begin to weigh in favor of abstention.

That analysis, indeed, is the same one that led the Seventh Circuit to reject *Cohen* appealability in *Microsoftware, supra,* 686 F.2d 531, 534. ("[T]he district court is free to reconsider its denial of the stay throughout the course of the litigation.")

This Court, however, explicitly rejected such a "conclusiveness" obstacle in *Moses H. Cone Hospital.* After finding the other two *Cohen* tests met,—an important collateral issue, effectively unreviewable on appeal from final judgment—the Court turned to the respondent's argument that an order staying litigation could always be reconsidered:

> But this is true only in the technical sense that every order short of a final decree is subject to reopening at the discretion of the district judge.[14]
>
> * * *
>
> [14] . . . [V]irtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown; yet that does not make all pretrial orders "inherently tentative" in the sense of that phrase in Coopers & Lybrand [v. Livesay, 437 U.S. 463 (1978)] . . . . Many . . . orders . . . are made with the expectation

> that they will be the final word on the subject addressed. The reasoning of Coopers & Lybrand . . . only [reaches] those as to which some revision might reasonably be expected in the ordinary course of litigation.

Thus, in *Moses H. Cone Hospital,* the Court found no indication that the district judge, "contemplated any reconsideration," 460 U.S. at 13, of his *Colorado River* ruling.

Here, too, the *Colorado River* ruling was announced with all indicia of "the final word on the subject addressed." The fact that the ruling was a denial of a stay, not a grant, seems completely immaterial for the purposes of the discussion in *Moses H. Cone Hospital.* The district court decided to move forward to trial notwithstanding the prior pending state court litigation in Georgia. Indeed, the case for *Cohen* appealability seems even stronger here, where a stay was necessary to vindicate the Congressional intent in the removal statutes.[2]

C. CERTIORARI IS ALSO WARRANTED TO SET GUIDELINES FOR INTERIM STAYS PENDING REVIEW OF SUCH ORDERS, BY WAY OF APPEAL OR MANDAMUS AS THE CASE MAY BE

An interlocutory order refusing a stay or dismissal of a federal action pursuant to *Colorado River* can quickly evade meaningful appellate review. This Court stated as follows in *Mitchell v. Forsyth,* 474 U.S. ____, 86 L.Ed.2d 411, 53 U.S.L.W. 4798 (1985):

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[2] If appealability is limited for historical or other reasons to orders granting a *Colorado River* stay, the use of mandamus should be endorsed strongly in cases like this one. Otherwise, the demands of the removal statutes will have no effective appellate enforcement. The Ninth Circuit's opinion below, to be published, summarily denies a mandamus review on the grounds that there is "no serious hardship or prejudice" from this egregious type of duplicative federal lawsuit, no "clear and undisputed right to the writ," and no abuse of "the district court's discretion to deny the motion." These broad statements effectively preclude mandamus review, and thus *any* review, in this important area of the law.

> A major characteristic of the denial or granting of a claim appealable under Cohen's "collateral order" doctrine is that "unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all." . . . [citation omitted] When a district court has denied a defendant's claim of right not to stand trial, on double jeopardy grounds, for example, we have consistently held the court's decision appealable, for such a right cannot be effectively vindicated after the trial has occurred. (86 L.Ed.2d at 424)

On Gulfstream's *Colorado River* motion, similarly, there was a "claim of right not to stand trial" in the federal court because of the prior pending state court litigation, and Mayacamas' circumvention of the removal statutes. As with double jeopardy and other like claims, a *Colorado River* claim "cannot be effectively vindicated after the trial has occurred." By then, much of the interference with state court litigation will have taken place, probably culminating in a federal *res judicata*. While this would not *preclude* review, see *Nebraska Press Association v. Stuart*, 427 U.S. 539, 546-47 (1976), the progress of litigation obviously restricts its effectiveness.

The stay issue warrants certiorari under this Court's supervisory power. The Ninth Circuit denied, without comment, Gulfstream's motion for an interim stay of the district court proceedings pending an expedited review. The review consumed nine months, from notice of appeal (March 20, 1986) to opinion (December 19, 1986), while a duplicative federal lawsuit marched forward in contravention of Congress.

If the removal statutes are to be given their intended effect, there should be a strong presumption in favor of an interim stay of federal lawsuits circumventing those statutes, when the party unsuccessful on a stay motion seeks appellate review. Moreover, the presumption in favor of an interim stay should obtain whether or not this Court holds a denial order to be appealable. Interim stays should equally be endorsed by this Court if it limits review of *Colorado River* stay denial orders to the mandamus authority. (See *ante*, p. 11, fn. 2)

CONCLUSION

Certiorari should be granted because of the serious harm from lawsuits of this kind to the "interrelationship of the state and federal courts." *Brillhart, supra*, 316 U.S. at 494. That relationship is a fundamental element of our system of federalism, as reflected in the Founders' original and long-lasting design of the removal process. This case therefore presents a compelling occasion for the Supreme Court to speak.

Respectfully submitted,

BRONSON, BRONSON & MCKINNON

By ELLIOT L. BIEN
Attorney of Record for Petitioner
Gulfstream Aerospace Corporation

(Appendix follows)

Appendix A

For Publication

United States Court of Appeals
For the Ninth Circuit

No. 86-1830
DC # C-85-20658-RPA

MAYACAMAS CORPORATION,
a California corporation,
Plaintiff/Appellee,

vs.

GULFSTREAM AEROSPACE CORPORATION,
a Georgia corporation,
Defendant/Appellant.

OPINION

[Filed Dec. 19, 1986]

Appeal from the United States District Court
for the Northern District of California
District Judge Robert P. Aguilar, Presiding

[Argued and Submitted November 13, 1986—Berkeley]

Decided 12/19/86; Corrected January 16, 1987

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges.
WRIGHT, Circuit Judge.

Gulfstream appeals the denial of its motion to stay or dismiss the action pending the resolution of parallel state proceedings. We find these orders nonappealable and dismiss.

FACTS

Mayacamas, a California corporation, agreed to purchase an aircraft manufactured by Gulfstream, a Georgia corporation. Mayacamas later refused to make payments allegedly because Gulfstream increased the production and availability of its aircrafts. This allegedly frustrated Mayacamas's purpose, which according to Mayacamas was to transfer its rights when demand for the aircraft was high.

Gulfstream filed a breach of contract action against Mayacamas in a Georgia state court. About a month later, Mayacamas filed a diversity action against Gulfstream for breach of the same contract in the district court for the Northern District of California.

Each party has been inconvenienced prosecuting or defending the actions in the two fora. Witnesses and documents are located in both California and Georgia. There has been discovery in both actions.

Gulfstream moved to stay or dismiss the federal action pursuant to the abstention doctrine. *Colorado River Water District v. United States*, 424 U.S. 800 (1976).[1] The district court found no exceptional circumstances that justified abstention, even though the actions may be duplicative.

Gulfstream appeals, asserting jurisdiction under 28 U.S.C. § 1292(a)(1) and 28 U.S.C. § 1291. Alternatively, it requests its petition for appeal be treated as a petition for mandamus.

ANALYSIS

1. 28 U.S.C. § 1292(a)(1).

Neither this nor the Supreme Court has ruled on whether an order denying a stay of proceeding pending the resolution of a parallel state proceeding is appealable under 28 U.S.C. § 1292(a)(1).

We have jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continu-

[1] Factors considered under the *Colorado River* test include: (1) whether either court has exercised in rem jurisdiction; (2) the convenience of the federal forum; (3) avoidance of piecemeal litigation; (4) order of jurisdiction; (5) whether federal law provides the rule of decision; and (6) whether the state law proceeding is adequate to protect litigants' rights. *Colorado River Water District v. United States*, 424 U.S. at 818-19; *Moses H. Cone Hospital v. Mercury Const. Corp.*, 460 U.S., 23-27 (1983)

ing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ." 28 U.S.C. § 1292(a)(1).

Certain orders granting or denying a stay of litigation pending the outcome of a proceeding in another forum are analogous to injunctions and appealable under section 1292(a)(1). *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942).

But two criteria must be met. First, the action in which the order was made must be one that, before the fusion of law and equity, was an action at law. Second, the stay must be sought to permit the prior determination of some equitable defense or counterclaim. *Alascom, Inc. v. ITT North Elec. Co.*, 727 F.2d 1419, 1421 (9th Cir. 1984).

Here, the first prong is satisfied because the action is one at law: breach of contract with plaintiff seeking money damages. *See id.; Wren v. Sletten Constr. Co.*, 654 F.2d 529, 533 (9th Cir. 1981).

But the second prong is not satisfied. The stay was not sought to permit determination of an equitable defense. Avoiding duplicative litigation is an equitable consideration, not an equitable defense. *See Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1073 (3d Cir. 1983).

We decline to follow the Seventh Circuit, which ruled that a stay requested to prevent wasteful duplication of lawsuits is an equitable defense. *Microsoftware Computer Systems v. Ontel*, 686 F.2d 531 (7th Cir. 1982). Instead, we shall follow circuits that find these orders nonappealable under 1292(a)(1). *See Gold v. Johns-Manville Sales Corp.*, 723 F.2d at 1073 (equitable considerations do not constitute equitable defense); *Jackson Brewing Company v. Clarke*, 303 F.2d 844, 846 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962) (stay to permit pending state action between the parties not considered an equitable defense); *Andrews v. Southern Discount Co. of Georgia*, 662 F.2d 722, 724 (11th Cir. 1981) (stay to permit resolution of disputed issues in state court not appealable).

2. 28 U.S.C. § 1291

The denial of a stay is not a final decision appealable under section 1291 because it does not end the litigation on the merits. *In re Benny*, 791 F.2d 712, 718 (9th Cir. 1986); *see Carlin v. United States*, 324 U.S. 229, 233 (1945). But Gulfsteam argues that it is appealable under an exception to the final judgment rule: the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547 (1949).

This exception allows appeals from interlocutory orders that (1) conclusively determine a disputed question, (2) resolve an important issue separate from the merits, and (3) are effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *United States v. Ohnick*, 803 F.2d 1485 (9th Cir. 1986).

The collateral order exception applies only where there is an "asserted right the legal and practical value of which could be destroyed it it were not vindicated before trial." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). Before the *Cohen* test will apply, the appellant must show that the district court's erroneous decision will deprive him of some protected interest. *In re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1023-24 (9th Cir. 1981); *see Abney v. United States*, 431 U.S. 651, 659-60 (1977) (claimed violation of double jeopardy); *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2817 (1985) (claim of qualified immunity); *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984) (right of federal judge not to be indicted unless first impeached).

Here, Gulfstream has no right to have this federal action stayed or dismissed. It is not deprived of a protected interest[2] thus, we do not reach the *Cohen* test, and we find the order nonappealable.[3]

3. Writ of Mandamus

Gulfstream requests that its notice of appeal be treated as a petition for a writ of mandamus under 28 U.S.C. § 1651. We decline to do so.

No serious hardship or prejudice will result from the order denying a stay or dismissal. *See Hartland v. Alaska Airlines*, 544 F.2d 992, 1004 (9th Cir. 1976) (Wallace, J., concurring) Even if we were to grant review, Gulfstream can not show a clear and undisputed right to the writ. *See Bankers Life Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953); *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977) (providing five guidelines for mandamus analysis). It was well within the district court's discretion to deny the motion. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978).

APPEAL DISMISSED.

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[2] Gulfstream's reliance on *Commuter Transp. Systems, Inc. v. Hillbrough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), is inapposite. There, a denial of summary judgment on grounds of immunity was held appealable as a collateral order. But a claim of immunity is a protected interest that conclusively determines the defendant's right not to stand trial. *See Mitchell v. Forsyth*, 105 S. Ct. at 2816 (1985).

[3] Even if the order did involve a protected interest, it would not be appealable under *Cohen*. The denial of a stay does not conclusively determine the issue. The district court may reopen the order and consider a stay if the *Colorado River* factors begin to weigh in favor of abstention.

Filed December 19, 1986

Mayacamas Corporation

v.

Gulfstream Aerospace Corporation

No. 86-1830

Cathy A. Catterson, Clerk,
U.S. Court of Appeals

SNEED, Circuit Judge, Dissenting;

I respectfully dissent from the holding that this order is not appealable. Although the issue is a significant one, I shall not extend this expression of my views beyond stating that I would follow the Seventh Circuit's holding appearing in *Microsoftware Computer Systems v. Ontel Corporation*, 686 F.2d 531 (7th Cir. 1982). That is, in my view the order is appealable under 28 U.S. § 1292(a)(1).

It will serve little purpose for me to discuss the merits of the appeal. Suffice it to say, I would affirm the district court's refusal to abstain.

SUPPLEMENTAL APPENDIX

No. 86-1329

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

GULFSTREAM AEROSPACE CORPORATION,
a Georgia corporation,*
Petitioner,

VS.

MAYACAMAS CORPORATION,
a California corporation,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Gulfstream Aerospace Corporation

* Pursuant to Rule 28.1, we note petitioner's parent Delaware corporation of the same name, and sister Oklahoma and Texas corporations of the same name. The Delaware corporation is a wholly owned subsidiary of Chrysler Corporation. Respondent, Mayacamas Corporation, has no affiliated corporations to our knowledge.

United States District Court

Northern District of California

No. C 85-20658 RPA

Mayacamas Corporation,
Plaintiff,

vs.

Gulfstream Aerospace Corporation,
Defendant.

Order Denying Motion to Dismiss or Stay

[Filed Feb. 21, 1986]

The Court, having considered the memoranda addressing defendant's motion for a stay or dismissal pursuant to the doctrine of abstention, and having heard the argument of counsel, orders as follows.

Pursuant to the doctrine of abstention on the basis of "wise judicial economy" as set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), this Court must exercise its jurisdiction.

The moving party has the burden of overcoming the strong presumption in favor of the exercise of federal jurisdiction in a case properly before a federal court. Despite the logic of the defendant's concern that this federal diversity case may be duplicative of the state court litigation filed 23 days earlier, the facts of this case fall short of those necessary to justify abstention.

The Court DENIES defendant's motion for a stay or dismissal of this case.

IT IS SO ORDERED.

DATED: January 24, 1986.

/s/ ROBERT P. AGUILAR
Robert P. Aguilar
United States District Judge

OPPOSITION

BRIEF

No. 86-1329

In The
Supreme Court of the United States
October Term, 1986

GULFSTREAM AEROSPACE CORPORATION,
a Georgia corporation,

Petitioner,

vs.

MAYACAMAS CORPORATION,
a California corporation,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is an order refusing to stay an action appealable under either 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1)?

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STATEMENT OF THE CASE

Respondent Mayacamas Corporation ("respondent") disagrees with the statement of the case presented by petitioner in the following respect: the Ninth Circuit, in its opinion below, did not reach the merits of petitioner's argument that *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1986), mandated a stay of the district court action.

The opinion below clearly states, "We find these orders nonappealable and dismiss" (A.1), and it was to this issue that the Ninth Circuit principally devoted its analysis. Having found the order was not appealable, the court refused to treat the notice of appeal as a petition for writ of mandamus under 28 U.S.C. § 1651. (A.5) The Ninth Circuit did not grant review, and the merits of petitioner's argument that a stay should have been granted, therefore, are not properly before this Court. *United States v. Fleischman*, 339 U.S. 349, 365 (1950); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76*, 323 U.S. 210, 214 (1944).

SUMMARY OF ARGUMENT

The only issue raised by the Ninth Circuit's decision below is whether a district court's refusal to stay an action to avoid duplicative litigation is appealable, either by application of the "*Enelow/Ettelson*" rule to 28 U.S.C. § 1292(a)(1), or under the *Cohen* exception to 28 U.S.C. § 1291. This issue is not worthy of the Supreme Court's consider-

ation because it does not involve a matter of great public concern, and is not the subject of a "real and embarrassing" conflict among the circuits.

The narrowly confined conflict implicated by the Ninth Circuit's refusal to hear an appeal pursuant to § 1292(a)(1) is likely to be resolved through future decisions in the circuit courts. At the present time only the Seventh Circuit allows such appeals, based on its decision in *Microsoftware Computer Systems, Inc. v. Ontel Corp.*, 686 F.2d 531 (7th Cir. 1982), which found the avoidance of duplicative litigation to be an equitable defense within the meaning of the *"Enelow/Ettelson"* rule. The *Microsoftware* court acknowledged the experimental nature of its decision, however, and subsequent cases indicate that the Seventh Circuit is in the process of abandoning its general rule.

Even if the Seventh Circuit were to reverse its present trend and once again fully embrace the *Microsoftware* rule, the resulting conflict would not be intolerable because it is narrowly confined to an area where uniformity is not a necessity. No harm is done by allowing the circuit courts of appeals to decide for themselves the amount of guidance to be given to district courts in the exercise of their discretionary power to control their own dockets.

As to the nonappealability of the district court's order under § 1291, there is no conflict whatsoever. No circuit court of appeals has permitted such an appeal based on the *Cohen* rule.

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ARGUMENT

A. THE PETITION SHOULD BE DENIED BECAUSE THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING IT

A review on writ of certiorari should be granted "only when there are special and important reasons therefore." Sup.Ct. R. 17.1. This contemplates that the Court "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

First, the decision below implicates no issue of great public concern. The national impact of allowing it to stand would be minimal. Conversely, the only persons with an interest in seeing it reversed are litigants who become unhappy with a district court's discretionary refusal to grant a stay.

Second, in determining whether a "real and embarrassing" conflict exists, this Court need not consider cases where it seems likely that the conflict may be resolved as a result of future cases in the courts of appeals, or where the impact of the conflict is narrowly confined. J. Harlan, "Some Aspects Of The Judicial Process In The Supreme Court Of The United States", 33 Aust LJ 108, 112 (1959). "[A] conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is

clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone." *Id.*

The decision below is clearly in disagreement with the Seventh Circuit holding in *Microsoftware Computer Systems, Inc. v. Ontel Corp.*, 686 F.2d 531 (7th Cir. 1982). This disagreement is narrowly confined, however, and is likely to be resolved altogether if the current Seventh Circuit trend of limiting *Microsoftware* continues.

Microsoftware held that the "*Enelow/Ettelson*" rule[1] permits appeals under 28 U.S.C. 1292(a)(1) where a district court denies a motion to stay brought to avoid duplicative litigation. The "*Enelow/Ettelson*" rule is applied throughout the circuits to permit an appeal where the underlying action is one at law and a stay is sought to permit a prior determination of an equitable defense or counterclaim. 9 *Moore's Federal Practice* § 110.20[3] (2d ed. 1985). In *Microsoftware*, the Seventh Circuit reasoned that this second requirement is satisfied where an action is stayed on the equitable grounds of avoiding duplicative litigation. 686 F.2d at 536. In its decision below, the Ninth Circuit followed the more widely held view that avoidance of duplicative litigation is an equitable consideration for a district court, but not an equitable defense or counterclaim to the action at law. (A.3)

Microsoftware has not been followed outside the Seventh Circuit, and represents a limited and, most likely, temporary deviation from the more widely accepted rule of nonappealability. In the *Microsoftware* decision itself,

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[1] *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942); *Enelow v. New York Life Insurance Co.*, 293 U.S. 379 (1935).

the Seventh Circuit implicitly recognized the tenuous and experimental nature of its holding. It acknowledged that allowing interlocutory appeals from a denial of a motion to stay would create inconveniences but "*estimate[d]*" that such inconveniences would be offset by other considerations. 686 F.2d at 534 (emphasis added). While hoping that further experience would not force it to repeal its decision, the court admitted that its codification was "but a phase in a continuous growth" and that it was free to reconsider its decision and repeal it if necessary. *Id.*, n. 3.

The Seventh Circuit's process of limiting *Microsoftware* has already begun. In *Texaco, Inc. v. Cottage Hill Operating Co.*, 709 F.2d 452 (7th Cir. 1983), the court held that it had no jurisdiction to hear an appeal from a district court denial of a motion to stay, even though the motion was brought to avoid duplicative litigation. *Microsoftware* was distinguished on the basis that the resolution of the state court proceeding would not render the federal proceeding unnecessary, but, at most, less complex. 709 F.2d at 454. In effect, the *Texaco* court found that concerns over judicial economy were not an "equitable defense" and followed the more widely accepted rule and rationale for nonappealability.

In *Medtronic, Inc. v. Intermedics, Inc.*, 725 F.2d 440 (7th Cir. 1984), the court concluded that the denial of a stay could be appealed when there was a vexatious multiplicity of suits. The court reasoned that, prior to the merger of law and equity, the plaintiff's conduct in harassing defendant with a multiplicity of suits would have been a valid basis for obtaining an injunction from a court of equity. 725 F.2d at 442. This is a considerably narrower

application of "*Enclow/Ettelson*" than that set forth in *Microsoftware*.

The cases demonstrate that the Seventh Circuit has not embraced the general rule set forth in *Microsoftware* that the denial of a stay is an appealable order, but has continued to examine the particular circumstances of each case. Given the recent trend, the outright abandonment of *Microsoftware* is very likely.

B. EVEN IF A REAL AND EMBARRASSING CONFLICT EXISTS, IT IS NOT INTOLERABLE.

Even if this Court were to decide that a real and embarrassing conflict does exist as a result of *Microsoftware* and its progeny, review in the Supreme Court is not necessary because, as it has been suggested, "the existence of differing rules of law in different sections of our great country is not always an intolerable evil." J. Stevens, "Some Thoughts on Judicial Restraint", 66 Judicature 177, 183 (1982). In allowing interlocutory appeals from district court denials of motions to stay, the Seventh Circuit appears to be engaged in the accepted process of experimentation. While it would be better if federal law were applied uniformly in all federal courts,

> experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Id.

Reconciliation of a conflict by this Court is justified where a uniform rule of law is a necessity. *See, Commissioner of Internal Revenue v. Bilder*, 369 U.S. 499, 501 (1962) (certiorari granted because of contrary holdings between two circuits and the "need for a uniform rule on the [disputed] point"); *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1015 (1978) (White, J., Blackmun, J., dissenting) ("This conflict among jurisdictions over an issue which 'imperatively demand[s] a single uniform rule' . . . commands the Court's immediate attention").

The question presented by the decision below is not one that demands a uniform answer throughout the country. No harm is done by allowing the individual circuit courts of appeals to decide for themselves the amount of oversight to be given to undeniably discretionary decisions of the district courts.

A district court's authority to stay the action before it is derived from its inherent power to control its own docket. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). While a court of appeals might decide that broad guidelines should be articulated to assist district courts in making such decisions, *Microsoftware*, 676 F.2d at 535, another might just as readily determine that such guidelines are not needed. Given the discretionary nature of the decision in the district courts, the Supreme Court should not feel compelled to make the decision for the circuit courts of appeals.

In *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978), Justice White recounted numerous cases on a single Conference List in which the Supreme Court decided that review was not necessary despite the existence

of a conflict among the circuits. 439 U.S. at 1017-1019. The issues presented by these cases include the appropriateness of distinguishing standards of competence against which paid and appointed counsel should be measured; whether a timely administrative claim is a jurisdictional prerequisite to suit against the United States under the Federal Driver's Act; the proper interpretation of "solicitation" under 15 U.S.C. § 381(a), which prohibits a state from taxing the income of persons whose only contact with the state is solicitation; the permissibility of an unrequested second *Allen* charge to a jury; the breadth of a federal bank robbery statute; whether a defendant is entitled to a constitutional challenge of a firearms conviction in a subsequent prosecution; the extent of the application of res judicata principles to federal constitutional issues; and the admissibility of grand jury testimony of an unavailable witness in a criminal trial.

The issue presented to the Court in the instant case pales in comparison to those enumerated in *Brown*. If the integrity of our federal judicial system can withstand conflicting rules on such issues, it can certainly tolerate a limited conflict as to the appealability of district court denials of motions to stay.

C. THERE IS NO CONFLICT AS TO THE INAPPLICABILITY OF THE COHEN RULE TO A DENIAL OF A MOTION TO STAY

Petitioner contends that certiorari should be granted in this case to clarify the continuing integrity of the "collateral order" doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). No such clarification is necessary. Although the *Cohen* doctrine has

been applied, with good reason, to authorize, under 28 U.S.C. § 1291, an appeal of a district court order *granting* a stay, *Moses H. Cone Memorial Hospital v. Mercury Construction*, 480 U.S. 1, 11 (1983), neither this Court nor any circuit court of appeals has allowed an appeal from an order *denying* a stay on this basis. Indeed, even in *Microsoftware*, the court considered and expressly rejected the right to such an appeal. 686 F.2d at 534. The reasoning is clear—a refusal to stay an action, by its very nature, concludes nothing. While a decision to grant a stay effectively removes the parties from the federal court, a decision to deny a stay merely forces them to continue there. *Moses H. Cone* does not suggest a contrary conclusion.

D. THIS COURT'S RESOLUTION OF THE APPEALABILITY QUESTION IS UNLIKELY TO CHANGE THE ULTIMATE RESULT REACHED BELOW

Certiorari may properly be denied, even in the face of a conflict among circuits as to an important issue, where resolution of the conflict is unlikely to change the result obtained below. Stern, Gressman and Shapiro, *Supreme Court Practice*, (6th ed. 1986), pp. 201-02 (discussing *Sommerville v. United States*, 376 U.S. 909 (1969)). As acknowledged even by Justice Sneed in his dissent below, the district court in this case properly refused to stay the action before it. (A6).

Federal district courts have a "virtually unflagging obligation to exercise the jurisdiction given them," *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), and the decision whether or not to stay must be heavily weighted in favor of exercising

jurisdiction. *Moses H. Cone* at 16. Notwithstanding petitioner's suggestion otherwise, neither *Moses H. Cone* nor *Microsoftware* recognized any different rule when a party fails to remove a state action to federal court. Footnote 20 of the *Moses H. Cone* decision, relied on by petitioner, merely acknowledged that the vexatious or reactive nature of a claim may influence the decision whether or not to stay an action. 460 U.S. at 17, n. 20. *Microsoftware* simply observed that the availability of removal jurisdiction weakens a claim of a federal interest in protecting "out-of-staters" from local bias. 686 F.2d at 537.

The district court below found no exceptional circumstances to warrant a stay. Petitioner's desire for a second bite at the discretionary apple is understandable. It has presented no authoritative argument, however, that such a second effort is warranted or would be fruitful.

CONCLUSION

The issue presented by the decision below is not one which requires the immediate attention of this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MOSHER, POOLEY & SULLIVAN

By: JAMES H.A. POOLEY
GREGORY H. WARD
BRUCE PRESCOTT

REPLY BRIEF

No. 86-1329

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

GULFSTREAM AEROSPACE CORPORATION,
a Georgia Corporation,
Petitioner,

VS.

MAYACAMAS CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court

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OCTOBER TERM, 1986

GULFSTREAM AEROSPACE CORPORATION,
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MAYACAMAS CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I
INTRODUCTION

Petitioner, Gulfstream Aerospace Corporation ("Gulfstream"), submits this reply brief pursuant to Supreme Court Rule 22.5, solely to respond to the two major arguments raised in the brief in opposition filed by respondent, Mayacamas corporation ("Mayacamas").

First, Mayacamas takes the position that the principal issue raised by Gulfstream in this Court is moot, because the Ninth Circuit Court of Appeals ultimately held that neither an appeal nor a writ of mandamus would lie to review the district court order in question. On that premise (see Opp., p. 1), Mayacamas elects to make no comment whatsoever on the implications for this case of the removal jursidiction and the proper relationship between the federal and state courts. Gulfstream will briefly demonstrate here why those matters, fully set forth at Point A of

its petition, are indeed critical factors in judging the correctness of the Ninth Circuit's disposition of this case.

Secondly, although Mayacamas focuses exclusively on the appealability issue, it misstates the position of the Seventh Circuit Court of Appeals in an attempt to deny or deprecate its conflict on that issue, too, with the Ninth Circuit. Mayacamas resorts to the surprising step of painting *Microsoftware Computer Systems, Inc. v. Ontel Corp.*, 686 F.2d 531 (7th Cir. 1982), as a precedent no longer in favor in its own Circuit (or elsewhere). This effort, too, can be quickly refuted.

In sum, the importance of this case stands completely undiminished by the principal claims of Mayacamas' opposition.

II

CONTRARY TO THE CLAIM OF MOOTNESS, THE NINTH CIRCUIT REJECTED BOTH APPEALABILITY AND MANDAMUS REVIEW OF THE DISTRICT COURT'S ORDER ON THE BASIS OF A REJECTION OF GULFSTREAM'S PRINCIPAL CONTENTION ON THE MERITS

As pointed out repeatedly in the petition for certiorari, the Ninth Circuit Court of Appeals did not moot, but *rejected*, Gulfstream's principal substantive contention in this case. In reaching its two ultimate dispositions—to dismiss the appeal, and deny review by writ of mandamus—the Ninth Circuit's reasoning clearly included a substantive holding: that, notwithstanding Mayacamas' spurning of its removal forum and invocation of a duplicative and gratuitous federal interference with a state court, Gulfstream's motion designed to avoid that interference presented no more than an ordinary exercise of discretion.

Mayacamas' two short paragraphs on this subject (Opp., p. 1), fail to consider the following aspects of the Ninth Circuit's opinion:

> (1) The Ninth Circuit rejected appellate jurisdiction in this case under the *Cohen* "collateral order"' doctrine on the basis of a holding that Gulfstream was "not deprived of a protected interest." (Pet., p. A-5)
>
> (2) The Ninth Circuit rejected appellate jurisdiction under the *Enelow/Ettelson* doctrine on the basis of a holding that "[a]voiding duplicative litigation is [merely] an equitable consideration, not an equitable defense." (*Id.*, p. A-3)
>
> (3) The Ninth Circuit denied review under its mandamus authority on the bais of a holding that the stay request in this case was solely a matter of ordinary discretion and, thus, that there was "[n]o serious hardship or prejudice," and that Gulfstream "can not show a clear and undisputed right to the writ." (*Id.*, p. A-5)

Gulfstream, however, contended that there *was* a special right or "protected interest" supporting its motion. Gulfstream argued that the availablility of a removal forum in Georgia cast a unique light on Mayacamas' duplicative diversity suit in California; that it superseded the ordinary operation of discretion, because the demands of federalism built into the removal statutes could only be accommodated by a strong presumption in favor of a stay or dismissal of a lawsuit like this one. Nor could such a "defense" to the federal action be dismissed as a mere "equitable consideration," because that would not only bar appellate review, but also the proper analysis of Mayacamas' suit as a fundamentally disfavored tactic in our federal system.

The Ninth Circuit unmistakably rejected Gulfstream's substantive argument concerning the effect of the removal statutes. As shown above, on each of the three issues of appellate review covered in the opinion, the Ninth Circuit's ultimate holdings simply cannot be divorced from the substantive argument as Mayacamas suggests.

Finally, Mayacamas' own brief tacitly acknowledges the inextricable involvement of the substantive question with the appealability questions, and even with the question of the importance of this case for certiorari purposes. Mayacamas belittles this case because it purportedly "does not involve a matter of great public concern"—only "the amount of guidance to be given to the district courts in the exercise of their discretionary power to

control their own dockets." (Opp., p. 2) Later Mayacamas urges that any Circuit conflict is "not intolerable" (Opp., p. 6) because these "undeniably discretionary decisions" may safely be left to the individual Circuits. (Opp., p. 7) Finally, Mayacamas argues that the result will not change if the matter is remanded to the Ninth Circuit on the merits. (Opp., pp. 9-10) However, that argument, too, assumes that on remand a free discretion would remain as the governing principle of the case. (It also assumes that this Court would not pass on the merits of the stay issue itself, although the record is fully developed for such a decision.)

In all of the foregoing respects, Mayacamas simply *assumes* the proper resolution of the fundamental substantive issue presented herein: whether or not Mayacamas' spurning of the removal forum does, indeed, take this case out of the realm of ordinary discretion. In every instance, Mayacamas found it had to rely on its own resolution of the substantive issue in order to reach the next stage of the analysis. That was equally true for the Ninth Circuit. The issues are inextricably joined.

In the interests of federalism, and carrying out the intent of the removal statutes, Mayacamas should now be required to defend the order below if it can, on the merits, *along* with the implications of the merits for appellate jurisdiction.

III

THERE HAS BEEN NO RETREAT BY THE SEVENTH CIRCUIT FROM THE POSITION IN CONFLICT WITH THE NINTH CIRCUIT'S OPINION BELOW

While Mayacamas devotes its entire opposition to the question of appealability, totally ignoring the substantive issues, it nevertheless paints an inaccurate picture of a Seventh Circuit retreating from the appealability holding of *Microsoftware Computer Systems, Inc. v. Ontel Corp., supra*, 686 F.2d 531. Mayacamas also errs in stating that *Microsoftware* "has not been followed outside the Seventh Circuit. . . ." (Opp. p. 4)

In the most recent Seventh Circuit decision cited by Mayacamas, the purported "trend" of a retreat from *Microsoftware*

should be rather pronounced. But such a retreat is not even in evidence. In *Medtronics, Inc. v. Intermedics, Inc.*, 725 F.2d 440 (7th Cir. 1984), a unanimous Seventh Circuit panel cited *Microsoftware* as unqualifiedly valid authority for the proposition that it is an "equitable ground" within the *Enelow/Ettelson* doctrine—not merely an "equitable consideration" outside that doctrine—to urge that a federal suit be stayed in deference to a prior suit between the same parties. 725 F.2d at 442. Indeed, the prior suit in *Medtronics* was in a federal court, so that *Microsoftware* was if anything extended, not limited as Mayacamas urges.

Nor is there the slightest hint in *Medtronics* that *Microsoftware* had been limited or questioned in the other case cited by Mayacamas, *Texaco, Inc. v. Cottage Hill Operating Co.*, 709 F.2d 452 (7th Cir. 1983). There, unlike both *Microsoftware* and *Medtronics*, the litigation sought to be stayed did not have an identity of issues *or* parties with the prior suit. *Texaco* thus distinguished *Microsoftware*, but hardly "limited" it in the ordinary sense of that expression. Moreover, even if it did "limit" *Microsoftware*, the instant suit is unquestionably within the remaining core holding of the Seventh Circuit's conflicting authority.

Finally, the lack of a retreat from *Microsoftware* is further evidenced by its citation with approval in more recent cases, *Mozanec v. North Judson—Pierre School Corp.*, 750 F.2d 625, 627 (7th Cir. 1984), and *Matter of Special March 1981 Grand Jury*, 753 F.2d 575, 581 (7th Cir. 1985). And, two recent decisions in other Circuits have cited *Microsoftware* with approval, *DeVona v. City of Providence Through Napolitano*, 652 F.Supp. 683, 689 ("Clearly a rule which promotes the existence of federal-state conflict in these ways, is inimical to the promotion of orderly justice"), or have closely followed its approach. *National R. Passenger Corp. v. P. & W.R. Co.*, 798 F.2d 8 (1st Cir. 1986). The First Circuit's concluding remarks are equally apt here:

> Just as it makes little railroad sense to lay parallel tracks between stops when one set is sufficient, it makes little judicial sense for parallel litigation to proceed in federal and

state courts when one set of proceedings is capable of resolving the parties' disputes. (798 F.2d at 12)

IV

CONCLUSION

Despite Mayacamas' protests, there remains a conflict between the Circuits on the issues presented in this case. Despite Mayacamas' election not even to discuss the removal statutes and "the interrelationship of the state and federal courts," *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494 (1940), Mayacamas' litigation strategy poses a significant challenge to important concerns in our federal system.

The Ninth Circuit did not moot those concerns, but rejected them out of hand. Certiorari should accordingly be granted.

DATED: May 13, 1987

Respectfully submitted,

BRONSON, BRONSON & MCKINNON

By ELLIOT L. BIEN
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Attorney of Record for Petitioner
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JOINT

APPENDIX

No. 86-1329

In The

Supreme Court of the United States

October Term, 1986

GULFSTREAM AEROSPACE CORPORATION,
a Georgia Corporation,

Petitioner,

vs.

MAYACAMAS CORPORATION,

Respondent.

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 12, 1987
CERTIORARI GRANTED MAY 26, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 9, 1985—Gulfstream files action against Mayacamas in Superior Court of Chatham County, Georgia.

November 1, 1985—Mayacamas files action against Gulfstream in United States District Court for the Northern District of California.

November 29, 1985—Gulfstream moves in the Northern District for an order dismissing or staying the action in view of the prior pending action in Georgia.

February 21, 1986—District Court denies Gulfstream's motion.

March 20, 1986—Gulfstream appeals to the United States Court of Appeals for the Ninth Circuit.

December 19, 1986—Ninth Circuit issues opinion dismissing the appeal.

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

GULFSTREAM AEROSPACE CORPORATION,	)	
Plaintiff,	)	CIVIL ACTION
v.	)	NO. X85-3244-B
MAYACAMAS CORPORATION,	)	
Defendant.	)	

COMPLAINT

COMES NOW Gulfstream Aerospace Corporation, Plaintiff in the above-styled action, and states its complaint as follows:

1.

Plaintiff Gulfstream Aerospace Corporation ("Gulfstream") is a corporation incorporated under the laws of the State of Georgia with its principal place of business in Chatham County, Georgia.

2.

Defendant Mayacamas Corporation ("Mayacamas") is a corporation incorporated under the laws of the State of California with its principal place of business in Santa Clara County, California.

3.

Jurisdiction and venue are proper in this Court. The Defendant corporation transacts business in Chatham

County, Georgia and specifically, without limiting the generality of the foregoing, Defendant entered into a contract that is the subject matter of this litigation which was to be performed in Chatham County, Georgia. The Defendant is subject to the jurisdiction of this Court. Defendant may be served pursuant to the provisions of O.C.G.A. § 9-10-90 and § 9-10-91 at the following address:

Mr. Roger L. Mosher
Registered Agent
525 University Avenue, Suite 1410
Palo Alto, CA 94301

4.

On June 1, 1983, the Defendant entered into a contract with the Plaintiff for the purchase of a Gulfstream IV aircraft to be delivered following flight testing and inspection to be conducted on or before February, 1987. A copy of said contract is attached hereto and made a part hereof as Exhibit "A".

5.

Pursuant to the terms of such agreement Plaintiff billed Defendant for $675,500.00 by invoice dated July 8, 1985, a copy of which is annexed as Exhibit "B".

6.

On August 13, 1985, Mayacamas demanded that Gulfstream return the Defendant's deposit under the contract as well as pay $500,000.00 in damages. A copy of said demand is attached hereto and made a part hereof as Exhibit "C".

7.

On August 21, 1985, Gulfstream responded to Defendant's letter of August 13, 1985 making it clear that the Plaintiff was fully willing and able to perform its obligations under the contract here at issue and requesting that the Defendant inform the Plaintiff of the nature of any breach of contract alleged by the Defendant. A copy of said response dated August 21, 1985 is attached hereto and made a part hereof as Exhibit "D".

8.

Under the payment schedule in Section 3.2 of the contract that is attached hereto and made a part hereof as Exhibit "A", the Defendant was obligated to make a payment of five percent (5%) of the basic purchase price of the aircraft on or before August of 1985. The Defendant failed to make any such payment on or before August, 1985 and continues to be in default of the contract as of the date of this complaint.

9.

By letter dated September 3, 1985, a copy of which is annexed as Exhibit "E", Defendant was given an opportunity to cure the default in its obligations and has failed to do so.

10.

The Defendant's repudiation of the agreement and failure to meet the payment schedule contained in Section 3.2 of the contract that is attached hereto and made a part hereof as Exhibit "A" constitutes a material breach of the contract. The Plaintiff has at all times been and remains ready, willing and able to perform fully under the contract.

11.

As a result of Mayacamas' breach of the agreement, Gulfstream has been damaged in the amount of lost profit (including overhead), together with all incidental expenses, which amount exceeds $500,000.00.

12.

The Defendant has been stubbornly litigious and has caused Gulfstream unnecessary trouble and expense entitling Gulfstream to recover all expenses of litigation, including reasonable attorneys' fees and costs.

WHEREFORE, the Plaintiff respectfully prays as follows:

(a) Plaintiff be awarded an amount equal to the profit to be made on the aircraft sale here at issue as damages for the Defendant's willful breach of the contract as well as incidental, consequential and related damages arising directly from the Defendant's breach of the contract in an amount exceeding $500,000.00;

(b) That the Plaintiff be awarded the costs of this action, including reasonable attorneys' fees and expenses; and

(d) That the Plaintiff be given such other and further relief as the Court may deem just and equitable in the premises.

This 9th day of October, 1985.

BOUHAN, WILLIAMS & LEVY

BY: /s/ Frank W. Seiler
FRANK W. SEILER

BY: /s/ M. Brice Ladson by SPB
M. BRICE LADSON

BY: /s/ Susan P. Brown
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Attorneys for Plaintiff
MAYACAMAS CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION, a California Corporation, Plaintiff vs. GULFSTREAM AEROSPACE CORPORATION, a Georgia corporation, Defendant	NO. C85-20058 *COMPLAINT FOR DAMAGES* AND *DEMAND FOR JURY* (Filed Nov. 1, 1985)

Plaintiff MAYACAMAS CORPORATION (hereinafter referred to as "MAYACAMAS") alleges:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is, and at all times mentioned herein was, a California corporation with its principal place of business in Palo Alto, Santa Clara County, California.

2. Defendant GULFSTREAM AEROSPACE CORPORATION (hereinafter referred to as "GULFSTREAM") is, and at all times mentioned herein was, a

Georgia corporation with its principal place of business in Savannah, Georgia, doing business in the Northern District of California and in Santa Clara County, California.

3. This is a diversity action for breach of contract and other causes of action and the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

4. Venue is proper in this Court because of the residences of the parties and because the subject contract was negotiated, executed, and to be performed, by MAYACAMAS in Santa Clara County, California.

FIRST CAUSE OF ACTION

5. Plaintiff incorporates by reference Paragraphs 1 through 4 above.

6. In April and May of 1983, GULFSTREAM made the following representations to MAYACAMAS with the intent that MAYACAMAS rely upon said representations:

(a) That its production capacity for producing the new Gulfstream IV aircraft was limited, and GULFSTREAM would not and could not deliver more than approximately one (1) such aircraft every month;

(b) That no Gulfstream IV aircraft would be delivered to a purchaser prior to certification by the Federal Aviation Authority;

(c) That the first Gulfstream IV aircraft would not be delivered until November or December, 1986;

(d) That the sixth Gulfstream IV would be manufactured, certified, and ready for delivery in February, 1987;

(e) That GULFSTREAM already had more than 50 (50) purchasers for Gulfstream IV aircraft, and demand for the aircraft would substantially exceed supply throughout 1985, 1986 and 1987;

(f) That as a consequence of the above, the right to purchase and take delivery of the sixth Gulfstream IV aircraft scheduled for delivery in February, 1987, was of significant value over and above the purchase price of the aircraft; and

(g) That if MAYACAMAS contracted to purchase the sixth Gulfstream IV aircraft, GULFSTREAM would permit MAYACAMAS to transfer or assign its rights under the contract to a third party for value, and would cooperate in any assignment or transfer.

7. As a result of and in reliance upon the above representations by GULFSTREAM, MAYACAMAS entered into the Gulfstream IV Sales Agreement Number G-6 (the "Agreement") with GULFSTREAM in June, 1983, by which MAYACAMAS purchased the sixth Gulfstream IV aircraft to be manufactured, which would be certified and delivered on or before February, 1987, on a limited production and delivery schedule which limited the number of aircraft to be delivered to customers to approximately one (1) every month ("the subject aircraft"). The Agreement provided that MAYACAMAS could assign or transfer its rights under the Agreement.

8. Prior to, at the time of, and after the Agreement was executed, GULFSTREAM knew that:

(a) MAYACAMAS' purpose in entering into the contract was to transfer its right to receive delivery of

the subject aircraft to a third party willing to pay a premium or profit to MAYACAMAS for the right to purchase and take delivery of the subject aircraft in February, 1987;

(b) MAYACAMAS' purpose was to transfer its rights in 1985 when demand would be highest; and

(c) Any substantial acceleration or increase by GULFSTREAM in the announced and actual production and delivery schedule for Gulfstream IV aircraft would destroy the purpose for which MAYACAMAS had entered into the Agreement and cause MAYACAMAS to lose revenue and profits.

9. Pursuant to the Agreement, MAYACAMAS has paid a down payment of $673,500.00 to GULFSTREAM.

10. In or before August, 1985, with knowledge of the purpose for which MAYACAMAS entered into the Agreement, GULFSTREAM materially increased its production of Gulfstream IV aircraft, informing MAYACAMAS and the public that fifteen (15) additional, uncertified Gulfstream IV aircraft would be available for sale and delivery to customers prior to the availability of the sixth, certified Gulfstream IV aircraft previously scheduled to be delivered to MAYACAMAS or its designee on or about February, 1987.

11. GULFSTREAM'S announced intention to dramatically increase the number of aircraft to be delivered in 1986, and its announced intention to offer said aircraft for sale and delivery to customers prior to certification, is unprecedented, has eliminated the excess demand for said aircraft that GULFSTREAM represented to MAYACAMAS would be present, and has made it impossible for MAYA-

CAMAS to trransfer its right to receive the subject aircraft at a profit.

12. GULFSTREAM's actions have destroyed the subject matter and purpose for which MAYACAMAS entered into the Agreement, and GULFSTREAM has totally breached the Agreement with MAYACAMAS.

13. As a result of GULFSTREAM's breach of the Agreement, MAYACAMAS has been damaged in an amount to be ascertained, but in event less than $3,173,-500.00.

14. MAYACAMAS has fully performed its obligations under the Agreement, except as excused by GULFSTREAM's breach.

SECOND CAUSE OF ACTION

15. Plaintiff realleges and incorporates herein the allegations in Paragraphs 1 through 14 above.

16. The representations made by GULFSTREAM to MAYACAMAS were false. The true facts were that:

(a) GULFSTREAM's production capacity for Gulfstream IV aircraft was not limited as represented, and GULFSTREAM could produce and deliver as many as fifteen (15) additional Gulfstream IV aircraft in 1986 if it chose to do so;

(b) GULFSTREAM might deliver Gulfstream IV aircraft before certification by the Federal Aviation Authority;

(c) GULFSTREAM would be delivering the first Gulfstream IV aircraft in mid-1986;

(d) The sixth Gulfstream IV aircraft would be available for delivery in mid-1986 rather than February, 1987;

(e) GULFSTREAM was reserving the right to produce and deliver uncertified aircraft ahead of the promised delivery date for the subject aircraft, thereby destroying any value in MAYACAMAS' contract rights; and

(f) GULFSTREAM had no intention to permit, and would not permit, MAYACAMAS to transfer or assign for value its rights to the subject aircraft.

17. The representations by GULFSTREAM to MAYACAMAS were made with the intent to deceive and defraud MAYACAMAS, and MAYACAMAS, relied upon said representations to its detriment.

18. GULFSTREAM's representations and conduct were willful and malicious, and MAYACAMAS is entitled to exemplary damages according to proof, but in no event less than $3,000,000.00.

THIRD CAUSE OF ACTION

19. Plaintiff realleges and incorporates herein the allegations in Paragraphs 1 through 18 above.

20. GULFSTREAM's representations were made negligently, and without a reasonable basis for believing them to be true.

FOURTH CAUSE OF ACTION

21. Plaintiff realleges and incorporates herein the allegations in Paragraphs 1 through 20 above.

22. GULFSTEAM's actions are in breach of its duty of good faith and fair dealing toward MAYACAMAS.

WHEREFORE, MAYACAMAS prays that the Court award MAYACAMAS:

1. The return of its deposit and interest thereon;

2. Compensatory damages according to proof, but not less than $2,500,000.00;

3. Exemplary damages according to proof, but not less than $3,000,000.00;

4. For costs of suit; and

5. For such further relief as the Court may deem advisable herein.

DATED: October 31, 1985

MOSHER, POOLEY, SULLIVAN & HULTQUIST

/s/ By: GARY L. HULTQUIST
Attorneys for Plaintiff

DEMAND FOR JURY

Plaintiff hereby demands a jury on all issues so triable herein.

DATED: October 31, 1985

MOSHER, POOLEY, SULLIVAN & HULTQUIST

/s/ By: GARY L. HULTQUIST

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION, a California corporation, Plaintiff,	No. C 85 20658 RPA
vs.	
GULFSTREAM AEROSPACE CORPORATION, a Georgia corporation, Defendant.	Date: December 27, 1985 Time: 9:00 a.m. Dept: One

BRIEF IN SUPPORT OF MOTION
TO DISMISS OR STAY

(Filed November 29, 1985)

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TABLE OF AUTHORITIES

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION, a California corporation, Plaintiff, vs. GULFSTREAM AEROSPACE CORPORATION, a Georgia corporation, Defendant. /	No. C 85 20658 RPA BRIEF IN SUPPORT OF MOTION TO DISMISS OR STAY Date: December 27, 1985 Time: 9:00 a.m. Courtroom: One

INTRODUCTION

This is a motion by GULFSTREAM AEROSPACE CORPORATION ("Gulfstream") for an order staying or dismissing this diversity action on the grounds that all issues involved herein are already involved in and fully determinable by proceedings previously filed and served in and now pending in the Superior Court of Chatham County, Georgia. No federal issues are involved in either case, and the dispute arises our of a written Agreement which by its terms must be interpreted in accordance with Georgia law. The Georgia State Court action was both filed and served before the California case and is entitled to the highest priority in scheduling in Georgia, where discovery has begun or will begin within the week. There has been no ac-

tivity in the present case, other than the filing of the complaint, which Gulfstream submits was simply a defensive tactical maneuver and a classic example of forum shopping.

For all of these reasons, and particularly because Gulfstream neither maintains an office nor is qualified to transact business in California, wise judicial administration requires that this Court exercise its jurisdiction to dismiss or stay this case under the authority of *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976) and similar authority.

We will briefly discuss these points in greater detail below.

STATEMENT OF RELEVANT FACTS

According to plaintiff MAYACAMAS CORPORATION ("Mayacamas"), this is a diversity action for breach of contract and other causes of action. Complaint, ¶ 3) It was filed on November 1, 1985 and was served upon Gulfstream on November 13, 1985. (Ladson Affid., ¶ 7) More than a month before, on October 9, 1985, Gulfstream filed a breach of contract action against Mayacamas in state court in Georgia (the "Georgia action"), where Gulfstream has its principal place of business. A true copy of Gulfstream's complaint in the Georgia action is attached to the Affidavit of Thomas M. Ramee, Assistant General Counsel of Gulfstream, as Exhibit "A". The Georgia action was served upon Mayacamas on October 24, 1985 and/or November 1, 1985. (Ladson Affid., ¶¶ 3, 5)

The central issue in both cases is identical: which party breached a Gulfstream IV Sales Agreement (the "Agreement") whereby Mayacamas agreed to purchase an executive jet aircraft from Gulfstream? The gist of Mayacamas' claim is that Gulfstream breached the Agreement by "materially increasing" its production of the aircraft in question, thereby making Mayacamas' speculative "position in line" to receive the aircraft less valuable. (Complaint, ¶¶ 6-7) Gulfstream, in turn, alleges in the previously-filed Georgia action that Mayacamas has unjustifiably repudiated its purchase obligations under the Agreement, resulting in damages to Gulfstream in excess of $500,000. (Georgia Complaint, ¶¶ 10-11).[1]

No federal claims are involved in either case.

Section 13.3 of the Agreement provides that:

> This Agreement shall be construed and interpreted in accordance with the laws of the State of Georgia.

Under Georgia law, the Georgia action is entitled to the highest priority on the State Court's trial calendar and could begin trial as early as February, 1986. Gulfstream has already begun or will within the week begin discovery in the Georgia action. (Ladson Affid., ¶ 10)

Further, Mayacamas is clearly subject to jurisdiction in Georgia by virtue of, among other things, Georgia's Long Arm statute. (Ladson Affid., ¶ 4) By contrast, the

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[1] It is of course not necessary for the Court to address the merits of the parties' positions on this motion. Suffice it to say, however, that Gulfstream believes strongly that Mayacamas' position is frivolous at best and will ultimately subject Mayacamas, in addition to damages for its breach, to liability for Gulfstream's attorneys' fees pursuant to an appropriate enabling statute under Georgia law. (A summary of the basic facts giving rise to the dispute are set forth in paragraphs 3-8 and 10 of Mr. Ramee's Affidavit, filed herewith).

first status conference in the present case will not take place until March 21, 1986, and there has been no activity other than the filing of the complaint and this motion. Accordingly, it is virtually certain that the Georgia action will be tried first. As a practical matter, Mayacamas simply filed the present case as a defensive tactical maneuver in reaction to the previously-filed Georgia State Court action.

Gulfstream's principal place of business is located in Savannah, Georgia, as are all of Gulfstream's records, including those concerning agreements with other parties purchasing the same type of aircraft from Gulfstream. (Ramee Affid., ¶¶ 2, 12) In addition, the aircraft in question is to be manufactured in Georgia, and the Agreement provides for flight testing and inspection, delivery of the aircraft, payment of the purchase price, ground school, flight instruction, warranty work, and 150-hour inspection at Gulfstream's plant at Travis Field, Savannah, Georgia. (Ramee Affid., ¶ 12; Agreement, Sections 2.1, 2.3, 3.1, 6.1, 6.2, 8.4(b) and 8.10). Gulfstream, on the other hand, maintains no place of business in California and has not qualified to do business here. (Ramee Affid., ¶ 12(f))[2]

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[2] The Agreement also contains a merger provision in Section 13.2 providing, among other things, that the written Agreement constituted the entire agreement between the parties and superseded all communications, representations, and agreements made prior to signature. By its terms, this provision effectively nullifies Mayacamas' claims of promises and representations "outside" the Agreement.

DISCUSSION

I

THE COURT SHOULD DISMISS OR STAY THIS ACTION TO PROMOTE WISE JUDICIAL ADMINISTRATION *IN LIGHT OF THE PREVIOUSLY-FILED STATE COURT ACTION*

Following the United States Supreme Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), it is now well-established that district courts have discretion in certain circumstances to stay or dismiss an action in the federal courts because of the pendency of a similar action in the state courts.

Even before that decision, the Circuit Courts of Appeal, including the Ninth Circuit, had reached the same conclusion in a number of cases. *See, e.g., P.P.G. Industries, Inc. v. Continental Oil Co.*, 478 F.2d 674 (5th Cir. 1975) [district court had authority to stay a federal action in view of a previously-filed state court action which adequately protected the federal plaintiff's interest]; *Milk Drivers & Dairy Employees Union Local No. 338 v. Dairymen's League*, 304 F.2d 913, 915 (2d Cir. 1962) ["It is an established rule in this Circuit that the district court has the power to stay its proceedings if there is a prior action involving the same dispute pending in a state court."]; *Aetna State Bank v. Altheimer*, 430 F.2d 750, 756 (7th Cir. 1970) ["While it seems to be well-established that a federal court is not required to abate the normal *in personam* action on a plea of a pending action in a state court, nevertheless it is within the discretionary power of the district court to stay its proceedings pending the completion of

state proceedings."]; and *Weiner v. Shearson Hammill & Co.*, 521 F.2d 817, 821 (9th Cir. 1975) ["We thus conclude that the district court possesses the power to abate the present action, even though it be one both for a declaratory judgment and damages."].

In *Colorado River*, the Supreme Court removed all doubt as to the existence of this discretionary authority, noting that this type of federal court abstention was based upon considerations of "[w]ise judicial administration, giving a regard to conservation of judicial resources and comprehensive disposition of litigation." 424 U.S. at 817 (citations omitted). In this regard the Court noted that while the general rule was that the pendency of a state court action would not be a bar to federal court proceedings, and that the circumstances permitting the dismissal of a federal suit for reasons of wise judicial administration were considerably more limited than in other types of abstention, the "former circumstances, though exceptional, do nevertheless exist." 424 U.S. at 818.

Colorado River also outlines a number of factors which district courts could properly take into account in exercising their discretion in this regard, including the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. No one such factor is necessarily determinative; instead, what is needed is a "carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise. . . ." 424 U.S. at 818.

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), the Supreme Court noted that other factors could be considered as well, including particularly whether federal law provid s the rule of decision on the merits in the respective cases. In this regard the Court observed that the presence of fed ral law issues, *not* present herein, is a "major consideration" against abstention. The *Cone* Court also noted that an important reason against allowing a stay is the "probable inadequacy of the state-court proceeding to protect" the federal plaintiff's rights. 460 U.S. at 26. Finally, the Court noted that a determination that a federal suit was filed as a "defensive tactical maneuver" was also a factor to be considered by the district court in exercising its discretion.

> The reasoning . . . that the vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under Colorado River—has considerable merit. 460 U.S. at 17, n.20.

In the present case, virtually *all* of these factors suggest that this Court should exercise its discretion to dismiss or stay the present federal court action:

First, it is undisputed that federal jurisdiction herein is founded solely upon diversity and that no federal claims or rules of decision are involved.

Second, there is a complete identity of parties between the two actions, and the central claim in both cases is the same: breach of a written Agreement which by its terms must be construed in accordance with Georgia law. Neither federal law nor California State law is involved.

Third, the state court action in Georgia was both filed before the California action was filed and served before the California action was served.[3]

Fourth, this is clearly *not* a case where the previously-filed state court proceeding is inadequate to protect Mayacamas' claims. On the contrary, such claims are compulsory counterclaims in the Georgia action and will be fully and expeditiously litigated there. This is also not a case where any of Mayacamas' claims are within the exclusive jurisdiction of the federal courts.[4]

Fifth, while either the California or Georgia forum is to some degree "inconvenient" for Gulfstream and Mayacamas, respectively, it is noteworthy that the Agreement itself provides for flight testing and inspection, delivery of the aircraft, payment of the purchase price, ground school, flight instruction, warranty work, and 150-hour inspection, training, repair, maintenance, and payment of the purchase price in Savannah, Georgia, the site of the

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[3] If both actions had been filed in federal court, it is well-established that first action *filed* generally takes priority. *See, e.g., Weiner v. Shearson, Hammill & Co., Inc., supra,* 521 F.2d at 820 ["Where two federal district courts are involved, there has been little trouble in finding a discretionary power to abate the second action."]. Similiarly, if both actions had been filed in California state court, the first action *served* would have priority. *See, e.g., Torrey Pines Inn v. Superior Court,* 227 Cal. App.2d 265, 267 (1964). Under either of these criteria—filing or service—the Georgia action would have priority herein.

[4] Accordingly, the present case is quite different from that presented in *Silberkleit v. Kantrowitz,* 713 F.2d 433 (9th Cir. 1983), or *Turf Paradise, Inc. v. Arizona Downs,* 670 F.2d 813 (9th Cir. 1982), where the federal court litigant had made certain claims under ERISA and/or the 1934 Securities Act which were within the exclusive jurisdiction of the federal courts. As noted above, no federal claims of any sort are involved in either the present action or the Georgia action.

State Court action. All of Gulfstream's records, including those concerning agreements with other parties purchasing the same type of aircraft from Gulfstream, are also located in Georgia.[5]

Sixth, discovery has already begun or will soon begin in the state court action, which is entitled to the highest priority in scheduling for trial, conceivably as early as February, 1986, under applicable Georgia statutes. As a result, it is virtually certain that this dispute will first go to trial in Georgia. Allowing a parallel federal court action raising exactly the same issues on exactly the same Agreement between exactly the same parties would, as a result, simply result in unnecessary duplication of effort and a waste of this Court's judicial resources, particularly since the Agreement must be interpreted in accordance with Georgia law in *either forum.*

Finally, the sheer timing of the Federal Court action, which was filed on the same day or very shortly after the State Court action was served, raises a clear inference of forum shopping as a "defensive tactical maneuver."

In this regard the facts in the present case are remarkably similar in many respects to those in *Microsoftware Computer Systems, Inc. v. Ontel Corp.,* 686 F.2d 531 (7th Cir. 1982). In that case *Ontel,* a New York corporation, filed an action in New York state court against Microsoft-

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[5] Similarly, since Gulfstream neither transacts business nor is licensed to business in the Northern District, there is a significant question as to whether it is subject to personal jurisdiction, or venue in the present action. (Ramee Affid., ¶ 12(f)) Gulfstream reserves the right to make an appropriate motion on either or both of these issues, if necessary, in the unlikely event that the present motion is not granted.

ware Computer Systems ("MCS") for goods it had delivered to MCS pursuant to a written Agreement which provided that the "laws of the State of New York . . . shall govern this Agreement." Two months later, MCS filed a diversity action in Illinois state court alleging breach of contract, fraudulent misrepresentations, and other state law claims. Ontel then filed a motion requesting that the district court proceedings be stayed pending a final disposition of the New York state court action.

The district court denied the motion but the Seventh Circuit reversed, holding that it was an abuse of discretion for the district court *not* to grant a stay. In particular, the Seventh Circuit noted that in that case, as here, there was "no peculiarly 'federal' interest that would make trying a copy of the case in federal court preferable to trying only the original in state court." 686 F.2d at 537. It also noted that there, as here, the state court action was filed first "and there is no indication that the New York state courts cannot fully and fairly resolve the parties' dispute." 686 F.2d at 538. Finally, the Court noted that there, as is clearly also the case here:

> [T]here would be a grand waste of efforts by both the courts and parties in litigating the same issues regarding the same contract in two forums at once. . . . And even if there were less effort required to try the case in Illinois than New York, the former must be viewed as *additional* effort spent resolving the dispute because the New York court will not likely stay its proceedings in deference to the late-coming district court. 686 F.2d at 538 (emphasis in original).

Accordingly, the Seventh Circuit remanded the case for entry of an order granting the stay subject to any appropriate conditions.[6]

For all these same reasons, Gulfstream submits that this Court should exercise its discretion to dismiss or stay the present action.[7]

CONCLUSION

For all the foregoing reasons, we respectfully request the Court to enter an Order dismissing or staying the present action on the grounds of judicial economy and wise judicial administration in view of the pending and previously-filed state court action in Georgia.

DATED: November 27, 1985.

BRONSON, BRONSON & McKINNON
By /s/ ROBERT J. STUMPF
Attorneys for Defendant
GULFSTREAM AEROSPACE CORPORATION

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[6] *See also Corinthian Pool Corporation v. National Northeast Corp.*, 492 F.Supp.928 (D.N.Hamp. 1980), where the New Hampshire district court likewise stayed a federal diversity action in view of the pendency of a previously-filed action in Massachusetts state court which involved the same parties and practically the same issues. So also in the present case.

[7] As a practical matter, the difference between a dismissal and a stay of this federal action may not be significant. *See, e.g., Moses H. Cone Memorial Hospital, supra* 460 U.S. at 28 ["We can say, however, that a stay is as much a refusal to exercise federal jurisdiction as a dismissal."] However, either result will accomplish the desired object of avoiding duplicative litigation for sound and well-established reasons. Nevertheless, it may that this Court will wish to order only a stay in order to test the conclusion that the state court litigation will adequately and completely resolve the issues between the parties. Whether dismissed or stayed, however, this action should not proceed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION, a California Corporation,
Plaintiff,
vs.
GULFSTREAM AEROSPACE CORPORATION, a Georgia Corporation,
Defendant.

CIVIL ACTION NO. C-85-20658

(Filed November 29, 1985)

AFFIDAVIT OF THOMAS M. RAMEE

STATE OF GEORGIA)
)
COUNTY OF CHATNAM)

Personally appeared before me, the undersigned Notary in and for the County and State first above-mentioned, THOMAS M. RAMEE, who, being duly sworn, deposes and says:

1. My name is Thomas M. Ramee and I have personal knowledge of the matters sworn to in this Affidavit.

2. I am Assistant General Counsel to GULFSTREAM AEROSPACE CORPORATION ("GULFSTREAM"), a corporation organized and existing under the laws of the State of Georgia with its principal place of doing business in Chatham County, Georgia.

3. In 1983 and 1985, Defendant MAYACAMAS CORPORATION ("MAYACAMAS"), in connection with its related corporation, The Silicon Valley Express, purchased two GULFSTREAM aircraft which were converted to GULFSTREAM IIB aircraft according to specifications of MAYACAMAS and The Silicon Valley Express. MAYACAMAS and The Silicon Valley Express sent representatives to GULFSTREAM's manufacturing plant in Georgia during 1984 and 1985 to oversee the conversion process and the outfitting of the aircraft and participation in flight training. Payment for the aircraft was made in part by MAYACAMAS in Georgia.

4. In early 1983, MAYACAMAS, through its agent, Roger L. Mosher ("Mosher"), expressed an interest in purchasing a GULFSTREAM IV aircraft. On April 22, 1983, MAYACAMAS, through its agent, Gordon Stubbs, sent a telex to GULFSTREAM in Savannah confirming MAYACAMAS' agreement to deposit $100,000.00 for the purchase of a GULFSTREAM IV aircraft. This tentative agreement was reached pursuant to brief meetings in California between Mr. Mosher and Mr. H. M. Stumpf, Jr., then Regional Vice-President for Gulfstream Aerospace Corporation of Texas. The $100,000.00 deposit was sent to Mr. Stumpf several days thereafter.

5. On June 1, 1983, MAYACAMAS executed a Sales Contract obligating it to purchase a GULFSTREAM IV aircraft to be delivered to MAYACAMAS at GULFSTREAM's Savannah, Georgia plant on or before February, 1987. A copy of this contract is attached as Exhibit "A" to the Complaint filed in Georgia by GULFSTREAM, which Complaint is attached hereto and made a part hereof as Exhibit "A" (see Paragraph 8, infra). MAYACAMAS made a further down payment on purchase of the aircraft in the amount of $573,500.00 at the time that it submitted the Sales Contract to GULFSTREAM in compliance with Section 3.2(a) of the contract. The con-

tract was signed and accepted by GULFSTREAM in Savannah, Georgia on June 7, 1983.

6. Under Section 3.2(b) of the contract, MAYACAMAS owed an additional progress payment in the amount of 675,500.00 to GULFSTREAM, payable on or before August of 1985. On July 8, 1985, GULFSTREAM billed MAYACAMAS for the progress payment.

7. In mid-August of 1985, MAYACAMAS announced its intention not to perform under the Sales Contract of June 1, 1983, and demanded return of the monies previously paid GULFSTREAM for the GULFSTREAM IV aircraft, as well as $500,000.00 in damages.

8. Following correspondence between the parties attempting to resolve this dispute, GULFSTREAM instituted a Complaint for money damages against MAYACAMAS in the Superior Court of Chatham County, Georgia styled *Gulfstream Aerospace Corporation v. Mayacamas Corporation,* Civil Action No. X85-3244-B (the "Georgia suit"). A copy of the Complaint in this action, with attachments, including correspondence between the parties in August and September of 1985, is attached hereto and made a part hereof as Exhibit "A."

9. As is set forth in the Affidavit of M. Brice Ladson of Bouhan, Williams & Levy, counsel for GULFSTREAM in the Georgia suit, the Georgia action was filed on October 9, 1985, and served on MAYACAMAS on two separate occasions, October 24, 1985 and November 1, 1985. A copy of this affidavit is attached hereto and made a part hereof as Exhibit "B." On November 1, 1985, MAYACAMAS filed the instant action in this Court, which was subsequently served on GULFSTREAM on November 13, 1985.

10. MAYACAMAS contends in the instant case that GULFSTREAM agreed to sell MAYACAMAS the "sixth" GULFSTREAM IV aircraft in February of 1987, and that no GULFSTREAM IV aircraft would be delivered to any customers until November or December of 1986. MAYACAMAS contends that its ability to purchase the sixth GULFSTREAM aircraft produced in February of 1987, where there would be only a handful of other GULFSTREAM IV aircraft on the market, was crucial to its decision to buy the aircraft.

11. Despite MAYACAMAS' contentions in this suit, the June 1, 1983 Sales Contract between the parties provides only that GULFSTREAM will make available for flight testing and inspection at its Savannah, Georgia plant a GULFSTREAM IV aircraft on or before February, 1987 (Section 2.1). Nothing is stated in the contract obligating GULFSTREAM to sell MAYACAMAS the sixth GULFSTREAM IV aircraft manufactured, nor is anything stated in the contract concerning when other GULFSTREAM IV aircraft would be manufactured and sold.

12. GULFSTREAM filed suit in Georgia for a number of reasons, the first of which is that virtually all of the evidence at issue in this case is located in Georgia, as appears from the following:

(a) The aircraft is to be manufactured in Georgia, and MAYACAMAS must flight test, inspect and accept delivery of the aircraft in Georgia (Section 2.1);

(b) All of GULFSTREAM's records, including those concerning agreements with other parties, purchasing GULFSTREAM IV aircraft, are located in Georgia;

(c) Payment under the contract is to be made in Georgia (Section 3.1);

(d) The contract is to be construed in accordance with Georgia law (Section 13.3).

(e) Though Mr. Mosher of MAYACAMAS resides in California, the party negotiating the contract on behalf of GULFSTREAM, Mr. H. M. Stumpf, Jr., resides in Savannah, Georgia; and

(f) GULFSTREAM maintains no place of business in California, is not qualified to transact business there, and is thus not subject to the jurisdiction of this Court.

13. This Affidavit is given in support of the Motion to Stay or Dismiss of Defendant, GULFSTREAM Aerospace Corporation, or for use as evidence in this action, or for any other purpose authorized by law.

/s/ Thomas M. Ramee

Sworn to and subscribed
before me this 25th day
of November, 1985.

/s/ Mary P. Byrd
Notary Public
Exp. Date: 5/25/85.

GULFSTREAM AEROSPACE CORPORATION
GULFSTREAM IV SALES AGREEMENT
Number G-6

THIS AGREEMENT, made and entered into this First day of June 1983, by and between GULFSTREAM

AEROSPACE CORPORATION, a Georgia Corporation, having its principal place of business at Travis Field, Savannah, Georgia, and its mailing address at Post Office Box 2206, Savannah, Georgia 31402 (hereinafter "SELLER"), and Mayacamas Corporation, a California Corporation, located at 525 University Avenue, Suite 1410, Palo Alto, California 94301 (hereinafter "BUYER").

WITNESSETH:

WHEREAS, SELLER desires to sell, and BUYER desires to purchase, under the terms and conditions of this Agreement, the aircraft hereinafter described.

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE I

SUBJECT MATTER OF SALE

Section 1.1

SELLER shall sell and deliver to BUYER, and BUYER shall purchase from SELLER, one (1) Gulfstream IV aircraft (hereinafter the "Aircraft") manufactured by SELLER in accordance with Gulfstream IV Detail Specification dated March 1, 1983 (hereinafter the "Detail Specification") which Detail Specification is incorporated herein and made a part hereof as *Appendix A*. If there is any inconsistency between any provision of this Agreement and any provision of the Detail Specification, the provision of this Agreement shall control.

ARTICLE II

DELIVERY AND ACCEPTANCE OF AIRCRAFT

Section 2.1

SELLER shall make the Aircraft available to BUYER for flight testing and inspection at SELLER'S plant in Savannah, Georgia on *or before Feb.* 1987. SELLER shall give BUYER not less than five (5) days advance notice of the date on which the Aircraft will be ready for such flight testing and inspection. BUYER shall commence flight testing and inspection within fifteen (15) days after receipt of SELLER'S notice. If BUYER fails to commence flight testing and inspection during this period, *Section 2.5* shall apply.

Section 2.2

To satisfy BUYER'S obligation under *Section 2.1,* the Aircraft shall be subject to inspection and an initial flight test of not more than two (2) hours duration participated in by not more than two (2) of BUYER'S representatives to confirm that the Aircraft meets the terms of this Agreement. Should a discrepancy be revealed by such flight test or inspection, it shall be corrected promptly by SELLER at no cost to BUYER. Following the correction of a discrepancy, the Aircraft shall be reinspected and/or flight tested as appropriate subject to the limitations stated in this *Section 2.2.*

Section 2.3

After the correction of all discrepancies pursuant to *Section 2.2,* or if there are no discrepancies, upon completion of BUYER'S inspection and flight testing, the Aircraft shall be tendered for delivery to BUYER at SELL-

ER'S plant at Savannah, Georgia. This shall be known as the "Delivery Time." At the Delivery Time BUYER shall execute and deliver to SELLER a Memorandum of Delivery on a form to be provided by SELLER and remit the balance of the Total Purchase Price to SELLER as determined under *Section 3.1.* SELLER shall execute and deliver to BUYER a Bill of Sale for the Aircraft on a form approved by the Federal Aviation Administration (hereinafter "FAA"). Upon this exchange of documents BUYER accepts the Aircraft and thereafter all risks of loss or damage to the Aircraft shall be borne by BUYER. Further, title to the Aircraft shall pass from SELLER to BUYER upon such exchange, and BUYER'S acceptance shall be deemed evidence that the Aircraft complies with the terms of this Agreement and the Detail Specification. If BUYER fails to meet its obligation to accept the Aircraft at the Delivery Time, the provisions of *Section 2.5* shall apply.

Section 2.4

SELLER agrees that the transfer of title in the Aircraft to BUYER under *Section 2.3* shall vest full title in BUYER free and clear of any security interest or other lien or encumbrance against the Aircraft. SELLER further agrees that the Aircraft will have an appropriate Airworthiness Certificate from the FAA at the Delivery Time.

Section 2.5

If BUYER does not meet its obligation to inspect and/or flight test the Aircraft under *Section 2.1,* or to accept the Aircraft at the Delivery Time under *Section 2.3,* any unpaid balance of the Total Purchase Price as de-

termined under *Section 3.1* shall become due and payable, all risk of loss or damage to the Aircraft shall thereafter be borne by BUYER, and SELLER shall provide the Aircraft with suitable outside storage at the expense of BUYER. Further, upon ten (10) days prior written notice to BUYER, SELLER may terminate this Agreement no sooner than twenty-five (25) days after the unpaid balance of the Total Purchase Price has become due and payable under this *Section 2.5* and sell the Aircraft. Upon such a sale, SELLER will refund to BUYER the amount of BUYER'S payment received less: SELLER'S reasonable expenses of the sale of the Aircraft, storage charges and other costs which resulted from BUYER'S failure to commence flight testing and inspection or to accept the Aircraft; and the excess, if any, of the Total Purchase Price over the sales price received under this *Section 2.5*. In the event of a sale of the Aircraft under this *Section 2.5*, BUYER shall not be entitled to receive payment of any interest accrued on the down payment as determined under *Section 3.3*.

Section 2.6

If, after the acceptance of the Aircraft by BUYER, the Aircraft remains in or is returned to SELLER'S care, custody, or control for any purpose, BUYER shall retain risk of loss and hereby agrees to waive on behalf of itself and its insurance carrier(s), any claim, by way of subrogation or otherwise against SELLER for damages to or loss of the Aircraft arising out of or by reason of such care, custody or control.

Section 2.7

If, at the Delivery Time the Aircraft is temporarily equipped with the instruments and equipment listed in

the Flyaway Package of the Detail Specification, those instruments and equipment shall be loaned by SELLER to BUYER for the purpose of enabling the Aircraft to be ferried to the place where BUYER'S optional equipment and interior furnishings are to be installed. BUYER shall return all such instruments and equipment to SELLER or SELLER'S agent within thirty (30) days after the Aircraft leaves SELLER'S plant.

ARTICLE III

PURCHASE PRICE AND PAYMENT TERMS

Section 3.1

The Total Purchase Price of the Aircraft shall be the Basic Purchase Price determined under *Section 3.2 and 3.3* plus the Purchase Price Adjustment determined under *Appendix C*. The Total Purchase Price shall be paid at Savannah, Georgia in United States Dollars in cash, by check, or by bank transfer to a bank specified by SELLER.

Section 3.2

The Basic Purchase Price of the Aircraft shall be Thirteen Million Four Hundred and Seventy Thousand Dollars ($13,470,000.00).

The Total Purchase Price shall be paid in accordance with the following schedule:

(a) a downpayment of Five percent (5%) of the Basic Purchase Price shall be paid on execution of this Agreement less the amount of One Hundred Thousand Dollars ($100,000.00) previously received by SELLER from BUYER, which amount

will be applied to the Total Purchase Price upon execution of this Agreement;

(b) a second payment of five (5%) percent of the Basic Purchase Price payable on or before August 1985 (eighteen (18) months before the date for inspection of the Aircraft specified in *Section 2.1);*

(c) a third payment of thirty (30%) percent of the Basic Purchase Price payable on or before February 1986 (twelve (12) months before the date for inspection of the Aircraft specified in *Section 2.1*); and

(d) a fourth payment of thirty (30%) percent of the Basic Purchase Price on or before August 1986 six (6) months before the date for inspection of the Aircraft specified in *Section 2.1;* and

(e) the unpaid balance of the Basic Purchase Price, and the Purchase Price Adjustment as determined under *Appendix C* less the interest accrued under *Section 3.3*, shall be payable at the Delivery Time.

Section 3.3

The total downpayment made under *Section 3.2 (a)* shall accrue simple interest from the date of receipt of funds by the SELLER until the date specified in *Section 3.2(b)* hereof. Such interest shall be computed at the prime rate in effect from time to time at the First National Bank of Chicago. Accrued interest shall be credited to BUYER as a part of the payment required under *Section 3.2 (e)* and shall not be made available to BUYER prior to the time that payment is made unless otherwise provided in this Agreement.

Section 3.4

The Total Purchase Price does not include any sales, use, personal property, excise or other similar taxes or

assessments which may be imposed by any governmental authority upon this sales transaction, the Aircraft itself, or the use thereof by BUYER. BUYER agrees to pay any and all such taxes or assessments (or at its sole expense to defend against the imposition of any such taxes) which it is or may be held obligated by law to pay. SELLER shall notify BUYER of any such tax that any governmental authority is seeking to collect from SELLER and BUYER may assume the defense thereof at its sole expense. If BUYER does not defend, SELLER may pay the asserted tax and BUYER shall thereupon be obligated to reimburse SELLER for said tax and all reasonable expenses related thereto. The Total Purchase Price includes all sales, excise, or similar taxes assessed on the sale of materials or equipment to SELLER for incorporation into the Aircraft and any personal property taxes assessed against the Aircraft or any part thereof prior to delivery and the BUYER is not responsible for any additional payment in respect thereto. SELLER shall also pay any taxes imposed by a government on the income resulting from the sale of the Aircraft.

ARTICLE IV

TECHNICAL DATA

Section 4.1

At the Delivery Time, SELLER shall deliver to BUYER one (1) copy (together with all amendments to date, where applicable) of each of the following:

(a) A Bill of Sale on a form approved by the Federal Aviation Administration;

(b) Flight Manual approved by the FAA (including a Cruise Control Manual);

(c) Maintenance Manual;

(d) Wiring Diagrams;

(e) Parts Catalog;

(f) Inspection Schedule; and,

(g) List of all Customer Bulletins and Service Changes currently applicable to the Aircraft.

Section 4.2

Commencing on the date of execution of this Agreement, SELLER will deliver to BUYER from time to time printed copies of Customer Bulletins and Service Changes applicable to ther Aicraft and, from and after the acceptance of the Aircraft by BUYER, SELLER will also furnish to BUYER, at no additional charge, any amendments to the manuals and catalog described in *Section 4.1* applicable to the Aircraft for a period of ten (10) years after acceptance of the Aircraft by BUYER.

Section 4.3

It is understood that all of the publications, data, drawings or other information described in this *Article IV* or in the Detail Specification are proprietary to SELLER and that all rights to copyright belong to SELLER, shall be kept confidential by BUYER, and shall not be disclosed, used or transmitted to others except for the purpose of permitting BUYER or any subsequent owner to maintain, operate or repair the Aircraft or make any permitted installation or alteration thereto.

ARTICLE V

COMPUTERIZED MAINTENANCE PROGRAM

Section 5.1

SELLER shall provide BUYER, at no additional charge, participation in the Gulfstream IV Computerized Maintenance Program commencing upon BUYER'S acceptance of the Aircraft, continuing during the period the interior furnishings are being installed by BUYER'S completion agency and terminating twelve (12) months after such installation is complete. Thereafter, BUYER may elect to continue such participation by the payment of SELLER'S customary charges in effect from time to time.

ARTICLE VI
TRAINING

Section 6.1

SELLER shall provide at Savannah, Georgia, to trainees as designated by BUYER, at no additional charge to BUYER:

(a) a ground school course in the operation and maintenance of the Aircraft for up to two (2) pilots, including simulator training, provided by FlightSafety International for a period of twelve (12) months after completion of interior outfitting of the Aircraft; and

(b) a ground school course in the operation and maintenance of the Aircraft for up to two (2) mechanics, including three (3) hours simulator training for each mechanic.

Section 6.2

After BUYER has accepted the Aircraft, SELLER shall provide up to thirty (30) hours of flight instruction in BUYER'S aircraft for two (2) pilots designated by BUYER. Such instruction shall be given by a pilot of SELLER and shall be without charge to BUYER except that BUYER shall reimburse SELLER for cost of any fuel, oil or maintenance furnished for the Aircraft during the training period and for the reasonable living and traveling expenses of the instructor pilot during the training period if the training is given at a location other than SELLER'S plant at Travis Field, Savannah, Georgia.

Section 6.3

SELLER'S obligation to provide the training described in this *ARTICLE VI* shall expire twelve (12) months after the interior outfitting has been completed and the Aircraft is in operational use by BUYER. No credit or other financial adjustment shall be made for any unused training as specified in *Section 6.1* or *Section 6.2*.

ARTICLE VII

SPARE PARTS

Section 7.1

SELLER shall provide, prior to the delivery of the Aircraft to BUYER, a list of spare parts estimated to be sufficient to cover operations of the Aircraft for a period of twelve (12) months.

Section 7.2

SELLER shall maintain a reasonable stock of suitable and interchangeable spare parts for the Aircraft for

routine repairs and replacements for a period of ten (10) years after the date SELLER delivers its last production model of the Gulfstream IV Aircraft.

ARTICLE VIII

WARRANTIES

Section 8.1

Subject to the limitations and conditions hereinafter set forth, SELLER warrants that the Aircraft, its systems, accessories, equipment and parts supplied hereunder (other than any part thereof covered by the warranties referred to in *Section 8.3* hereof) shall, at the Delivery Time, be free from:

(a) defects in material or workmanship;

(b) defects arising from the selection of material or process of manufacture;

(c) defects inherent in the design thereof in view of the state of art at the time of design thereof; and

(d) defects arising from the failure to conform to the Detail Specification and the FAA Type Certificate for the Aircraft.

Section 8.2

Subject to the limitations and conditions hereinafter set forth, SELLER warrants that the parts covered by the warranty referred to in *Section 8.3* hereof shall, at the Delivery Time, conform to the description thereof contained in the Detail Specification and be free from:

(a) defects in workmanship used in the process of installation; and

(b) defects inherent in the design of the installation, in view of the state of art at the time of the design thereof.

Section 8.3

Except as set forth in *Section 8.2*, this warranty shall not apply to the Rolls-Royce engines installed in the Aircraft at the time of delivery, but SELLER represents that the Aircraft engine warranty annexed hereto as *Appendix B* will be extended by Rolls-Royce Limited (hereinafter "Rolls-Royce") to BUYER as the purchaser of the Aircraft. In addition, the warranties contained in this *Article VIII* do not apply to the interior outfitting of the Aircraft.

Section 8.4

Except as provided in *Section 8.5*, SELLER'S obligation under this *Article VIII* for failure to comply with its warranties shall be expressly limited to replacing, correcting or repairing:

(a) within a period of thirty-six (36) months from the Delivery Time or until the completion of 1,800 hours of flight operation of the Aircraft, whichever period is shorter, the metal structure of the Aircraft as described in the Detail Specification, *Section 4.1* through *Section 4.7.1*; and

(b) within a period of eighteen (18) months from the Delivery Time or until the completion of 1,000 hours of flight operation of the Aircraft, whichever period is shorter, any other airframe components and items supplied by vendors to SELLER, as described in the Detail Specification which shall be returned to SELLER'S plant at Travis Field, Savannah, Georgia, or the SELLER'S authorized service facility at Marshall's of Cambridge in Cambridge, England, or another location reasonably acceptable to both BUYER and SELLER with all transportation charges, taxes, imposts, duties or excises paid by BUYER, and which, upon appropriate examination (unless SELLER waives such examination in writing), shall show to have been not in compliance with such warranties. During the Aircraft's first 150 flight hours, SELLER'S obligation under this *Section 8.4* shall include labor charges; thereafter, labor charges are not included unless assumed in writing by SELLER.

Section 8.5

Any replacement, correction or repair under the warranties set forth in this *Article VIII* shall also be covered by a warranty with respect to materials and workmanship.

(a) if made after the Aircraft's first 150 flight hours where BUYER paid the labor charges, then the warranty shall be for a reasonable period, which shall not be less than SELLER'S usual warranty period applicable to any such replacement, correction or repair, or for the unexpired portion of the period of SELLER'S warranties under the provisions of *Section 8.4*, whichever is the longer; and

(b) if made at any time where SELLER has assumed the labor charges, then the warranty shall be for the unexpired portion of the period of SELLER'S warranties under the provisions of *Section 8.4*.

Section 8.6

The warranties set forth in this *Article VIII* shall run to BUYER, its successors and to all persons whom title

to the Aircraft may be transferred during the warranty period set forth in this *Article VIII.*

Section 8.7

To be entitled to the benefits of the warranties set forth in this *Article VIII,* BUYER shall maintain complete records of operations and maintenance of the Aircraft and engines and make records available for SELLER'S inspection. Failure to maintain such records shall be grounds for relieving SELLER of its warranty obligation hereunder. BUYER shall notify SELLER upon transfer of ownership of the Aircraft and BUYER shall also notify any subsequent purchaser or owner of the Aircraft of its obligation to maintain such records and to make them available for SELLER'S inspection and such owner shall comply therewith in order to be entitled to any corrective action under this *Article VIII.*

Section 8.8

The warranties set forth in this *Article VIII* shall not apply to any defect in the Aircraft or parts thereof which is shown to be the proximate result of an accident, misuse, neglect, improper installation, improper repair or improper modification by persons other than SELLER, its agents or employees, or if the Aircraft or parts thereof have been obtained by BUYER from a source other than SELLER or source authorized by SELLER, or if the Aircraft or parts thereof have not been operated or maintained in accordance with FAA approved operating and maintenance manuals, instructions or bulletins issued in respect of the Aircraft by SELLER.

Section 8.9

THE WARRANTIES SET FORTH IN THIS *ARTICLE VIII* ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES AND REPSESENTATIONS, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. These warranties are also in lieu of all other obligations and warranties, (including, without limitation the implied warranties of merchantability and fitness) related to any modifications, repairs, replacement parts or service change kits which may hereafter be furnished by SELLER to BUYER for use on the Aircraft either pursuant to this *Article VIII* or otherwise. Except for the obligations expressly undertaken by SELLER in this Agreement, BUYER hereby waives and releases all rights, claims and remedies with respect to any and all warranties, express, implied or statutory (including, without limitation, the implied warranties of merchantability and fitness), duties, obligations and liabilities in tort or contract arising by law or otherwise including liability for negligence, strict liability or product liability, and including, but without being limited to any obligations of SELLER with respect to incidental or consequential damages or damages for loss of use. No agreement or understandng varying or extending these warranties will be binding upon SELLER unless in writing, signed by a duly authorized representative of SELLER.

Section 8.10

SELLER shall perform the first one hundred fifty (150) hour inspection on the Aircraft at no charge to BUYER. Such inspection shall be performed at SELL-

ER'S plant at Savannah Municipal Airport, Travis Field, Savannah, Georgia.

ARTICLE IX

CHANGES

Section 9.1

Prior to Delivery Time, SELLER shall have the right, without the prior written consent of BUYER, to make changes in the Aircraft or Detail Specification and to substitute equivalent equipment, accessories or materials in the Aircraft where such changes or substitutions are deemed necessary by SELLER to prevent delays in manufacture or delivery or to improve the performance, producibility, stability, control, utility, maintenance or appearance of the Aircraft provided that such changes or substitutions shall not adversely affect the Delivery Time or the performance of the Aircraft. All costs of any such changes shall be borne by SELLER.

Section 9.2

SELLER will make any changes to the Aircraft which are required by applicable law or interpretation thereof by the FAA established after the execution date of this Agreement and before the Delivery Time to permit SELLER to obtain the appropriate Airworthiness Certificate referred to in *Section 2.4*. SELLER will give notice to BUYER upon obtaining knowledge of such requirement. BUYER shall remit to SELLER at the Delivery Time one half of the amount of the reasonable costs incurred by SELLER to effect the change, or give SELLER notice prior to the Delivery Time of its intention not to remit for its portion of such costs. Upon receiving such notice

SELLER may elect to either bear all costs arising under this Section and complete performance under this Agreement or terminate the Agreement by giving BUYER prompt notice of such termination. If SELLER terminates the Agreement under this Section, SELLER shall return to BUYER all payments previously made by BUYER which are applicable to the total purchase price of the Aircraft plus accrued interest under *Section 3.3*, and neither party shall have any further liability to the other resulting from this Agreement.

ARTICLE X

EXCUSABLE DELAYS

Section 10.1

SELLER shall not be charged with any liability for failure or delay in the performance of this Agreement or any terms and conditions thereof when the failure or delay is due to causes beyond the reasonable control of SELLER or without its fault or negligence. Such causes include but are not limited to: Acts of God; force majeure; any act of government; delay in transportation; strikes or labor trouble causing cessation, slow-down or interruption of work; or the inability after due and timely diligence of SELLER to procure materials, accessories, equipment or parts. The occurrence of such a cause of SELLER'S failure or delay shall extend the time specified under *Section 2.1* at which SELLER is to make the Aircraft available for flight testing and inspection by BUYER by the period of time required for SELLER to correct the cause of the failure or delay by using its best efforts to eliminate such cause or to overcome the effect thereof.

However, if the period of time required for correction shall be more than six (6) months, either party may terminate this Agreement by giving written notice to the other party within a fifteen (15) day period immediately following such six (6) month period. In the event of a termination of the Agreement pursuant to a notice under this *Section 10.1*, or if the cause of the failure of delay is such as to render performance of this Agreement impossible, SELLER shall return to BUYER all payments previously made by BUYER which are applicable to the Total Purchase Price of the Aircraft plus accrued interest under *Section 3.3*, and neither party shall have any further liability to the other resulting from this Agreement.

ARTICLE XI
TERMINATION

Section 11.1

This Agreement may be terminated by SELLER:

(a) under *Section 2.5;*

(b) under *Section 9.2;*

(c) under *Section 10.1;* or,

(d) upon the breach or default by BUYER of any other condition of this Agreement and the failure of BUYER to cure or remedy such breach or default promptly after receipt of notice thereof from SELLER.

Section 11.2

This Agreement may be terminated by SELLER without prior notice to BUYER upon the occurrence of any of the following events:

(a) the insolvency of BUYER;

(b) the institution by or against BUYER of any voluntary or involuntary proceedings under any insolvency or bankruptcy law;

(c) the adjudication of BUYER as a bankrupt or an insolvent;

(d) the appointment of a receiver of BUYER'S property; or,

(e) an assignment by BUYER for the benefit of its creditors.

Section 11.3

Upon the termination of this Agreement due to any of the events set forth in *Section 11.1 paragraph (d)* or *Section 11.2*, SELLER may sell the Aircraft in the same manner as provided in *Section 2.5* or seek other appropriate remedy.

Section 11.4

This Agreement may be terminated by BUYER:

(a) under *Section 10.1;*

(b) upon the default or breach by SELLER of any of the terms and conditions hereof and the failure of SELLER to cure or remedy such default or breach promptly after receipt of notice thereof from BUYER; provided, however, that a delay of less than three (3) months beyond the date scheduled in *Section 2.1* as the date the Aircraft shall be made available to the BUYER for flight testing and acceptance shall not be deemed to be a default or breach within the meaning of this *paragraph (b)* unless SELLER fails to use reasonable efforts to remove the causes of the delay and to resume performance of this Agreement with dispatch when such causes are removed; and provided, further, that BUYER at all times shall

have the right to refrain from exercising its right to termination under this *paragraph (b)*, and, except as provided in *Section 11.6*, to require specific performance by SELLER of all the terms and conditions of this Agreement; and,

(c) immediately, and without prior notice to SELLER, upon the occurrence of any of the following events:

(i) the insolvency of SELLER;

(ii) the institution by or against SELLER of any voluntary or involuntary proceedings under any insolvency or bankruptcy law;

(iii) the adjudication of SELLER as a bankrupt or an insolvent;

(iv) the appointment of a receiver of SELLER'S property; or,

(v) an assignment by SELLER for the benefit of creditors.

Section 11.5

In the event BUYER elects to terminate this Agreement pursuant to *Section 11.4*, SELLER shall promptly return to BUYER all payments theretofore made by BUYER which are applicable to the Total Purchase Price of the Aircraft plus accrued interest as set forth in *Section 3.3* and neither party shall have any further liability to the other resulting from this Agreement.

Section 11.6

This Agreement shall terminate upon the destruction or damage beyond repair of the Aircraft intended for BUYER prior to the Delivery Time. In the event that this Agreement is terminated pursuant to this *Section 11.6*, SELLER shall promptly return to BUYER all payments theretofore made by BUYER which are applicable to the Total Purchase Price of the Aircraft plus accrued interest as set forth in *Section 3.3* and neither party shall thereafter have any further liability to the other resulting from this Agreement.

ARTICLE XII

OPERATIONAL EQUIPMENT AND INTERIOR

Section 12.1

In order to assure a comfortable cabin environment for the Aircraft, in completing the installation of operational equipment and interior, BUYER shall require its completion agency to comply with SELLER'S Gulfstream IV Outfitting Interface Specification.

Section 12.2

BUYER shall require its completion agency to obtain SELLER'S prior written approval of the type and manner of engineering and modification which the completion agency proposes to make to the basic Aircraft which in any way concerns safety of flight, airworthiness of structural integrity of the Aircraft. Minor installation, not requiring detailed drawings, diagrams or layouts may be accomplished by BUYER'S completion agency without SELLER'S prior written approval, provided that such installations meet FAA and CAB requirements and do not adversely affect the safety, performance or pressurization systems of the Aircraft.

Section 12.3

Neither SELLER'S prior written approval under, nor BUYER'S completion agency's failure to comply with

Section 12.2 shall create any SELLER obligation with respect thereto under *Article VIII.*

ARTICLE XIII
MISCELLANEOUS

Section 13.1

Any notice given under this Agreement shall be sent by registered mail, certified mail or telegraph to the recipient party at the address shown above. A notice shall be deemed given when received.

Section 13.2

The terms and conditions contained herein constitute the entire Agreement between the parties hereto with respect to the purchase and sale of the Aircraft and shall supersede all communications, representations or agreements, either oral or written, between the parties hereto with respect to the subject matter hereof, and no agreement or understanding varying the terms and conditions hereof shall be binding upon either party hereto unless in writing attached hereto and signed by duly authorized representatives of both parties.

Section 13.3

This Agreement shall be construed and interpreted in accordance with the laws of the State of Georgia.

Section 13.4

This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, but this Agreement may not be voluntarily assigned in whole or in part by BUYER without the

prior written consent of SELLER, which consent shall not be unreasonably withheld; provided, however, that the BUYER may assign this Agreement without SELLER'S prior written consent if the entity to which this Agreement is being assigned is an affiliate of BUYER, which for these purposes shall be any corporation, partnership or other legal entity which is controlled by or under common control with BUYER or BUYER'S parent.

As to any assignment which requires SELLER'S consent, on the effective date of such assignment, any amounts to be paid pursuant to *Section 3.2(b) and (c),* if not yet paid, become immediately due and payable by BUYER or the assignee.

Section 13.5

SELLER represents and warrants that with respect to GULFSTREAM IV aircraft with similar specifications and similar delivery time as the Aircraft, SELLER has not nor will not grant any commercial purchaser prices and terms more favorable than granted to BUYER hereunder.

ARTICLE XIV
EXECUTION

IN WITNESS WHEREOF, the parties have caused this GULFSTREAM IV SALES AGREEMENT to be signed by their duly authorized representatives on the date first above written.

GULFSTREAM AEROSPACE
CORPORATION
(SELLER)

BY: Charles J. Voguery
TITLE: Senior Vice President
DATE: June 7, 1983

MAYACAMAS CORPORATION
(BUYER)
BY: Roger Z. Mosher
TITLE: President
DATE: June 1, 1983

APPENDIX C

GULFSTREAM IV PURCHASE PRICE ADJUSTMENT

1. The Purchase Price Adjustment (PPA) shall be determined as follows:

PPA=[Basic Purchase Price X (DI/BI)]—Basic Purchase Price

Basic Purchase Price=Dollar Amount as stated in *Section 3.2.*

DI (Delivery Index)=The most recently issued Industrial Commodities Index of the Producer Price Indexes (Table 3) as published by the U.S. Department of Labor, Bureau of Labor Statistics, in its monthly "NEWS" release [SEE NOTE BELOW] issued most recently prior to the submittal to BUYER of SELLER'S invoice for payment of the unpaid balance of the Total Purchase Price. The BUYER will be invoiced 2 weeks (14 days) prior to the scheduled delivery date specified in the contract or 2 weeks (14 days) prior to an advised delivery date. However, in no case shall a date be used that is later than 2 weeks (14 days) prior to the contract delivery date.

BI (Base Index)=314.0 The January 1983 Industrial Commodities Producer Index of the Producer Price Indexes (Table 3), as published by the U.S. Department of Labor, Bureau of Labor Statistics as published in the "NEWS" dated February 11, 1983.

[NOTE: Copies of "NEWS" may be obtained from: U.S. Department of Labor, Office of Publications, 441 G Street, N.W., Washington, D.C. 20210. Telephone: (202) 523-1222.]

2. If the Purchase Price Adjustment determined under the PPA Formula is a negative amount, such amount will not be taken into account in determining the Total Purchase Price of the Aircraft.

3. If the Department of Labor substantially revises the methodology used in computing the Industrial Commodities Producer Price Index or discontinues publication of the Index, the parties shall select a substitute index which will reflect as closely as possible the change in industrial commodity prices during the period from January 31, 1983 to the Delivery Time. Benchmark adjustments or other correction of previously published data by the Department of Labor shall not be considered a substantial revision of methodology.

4. In the event that the Total Purchase Price Adjustment as determined under *paragraph 1* may not lawfully be paid by BUYER as a result of any act of the United States Government, the Parties agree to equitably adjust the Basic Purchase Price of the Aircraft to reflect an allowance for increases in labor and material costs occurring after January 31, 1983, and prior to the Delivery Time.

GULFSTREAM AEROSPACE CORPORATION
Gulfstream Aerospace Corporation
P.O. Box 2206, Savannah, Georgia 31402-2206

CUST.	SOLD TO
CM275	MAYACAMAS CORPORATION 525 UNIVERSITY AVENUE SUITE 1410 PALO ALTO, CALIFORNIA 94301

Invoice Number Invoice Date
D-1943 7-08-85

GULFSTREAM IV SALES AGREEMENT
NUMBER G-6 DATED JUNE 1, 1983

ARTICLE III PURCHASE PRICE
& PAYMENT TERMS

(b) A SECOND PAYMENT OF 5% OF THE BASIC PURCHASE PRICE ($13,470,000.00) SHALL BE PAID ON OR BEFORE AUGUST 1985.

AMOUNT DUE $673,500.00

RESPECTFULLY REQUEST THAT PAYMENT BE MADE VIA WIRE TRANSFER TO: GULFSTREAM AEROSPACE CORPORATION; ACCOUNT NO. 59-13284; FIRST NATIONAL BANK OF CHICAGO, CHICAGO, ILLINOIS.

MAYACAMAS CORPORATION
525 UNIVERSITY AVENUE, SUITE 1410
PALO ALTO, CALIFORNIA 94301

August 13, 1985

VIA CERTIFIED MAIL

Mr. H. M. Stumpf, Jr.
Senior Vice President—Marketing
GULFSTREAM AEROSPACE CORPORATION
P. O. Box 2206
Savannah, GA 31402-2206

Dear Hank:

This confirms our telephone conversation on Monday, August 12, 1985 concerning the status of our G-IV contract.

As I told you, subsequent to our conversation of several weeks ago, wherein for the first time you advised of Gulfstream's intention to manufacture fifteen pre-certification G-IV aircraft with delivery commencing April or May of 1986, and to offer them for sale.

At the time of our conversation you indicated that Gulfstream would be prepared to let us "move up" to one of the positions in the pre-certification aircraft if:

(1) We were to accelerate the deposit schedule; and

(2) Agree that finishing work on the aircraft be done at Gulfstream inasmuch as the aircraft could not fly prior to certification.

In considering this as a possible alternative we have concluded that the financial and other risks involved in "moving up" are such that in terms of having an operable airplane, it is not much better than retaining the present position which is (according to your statement) an aircraft to be deliverable in March, 1987.

On the other hand, we have examined the possibility of retaining the present position and effecting a sale of our position in the Fall of this year as we had all along planned to do. We find the presence of these additional fifteen aircraft to be an incredible barrier to getting potential G-IV buyers or lessees interested. Because of all of the uncertainty in the marketplace, and the confusion as to just who is taking which airplane, such a buyer would be well advised to wait until the Fall of 1986 or even later at which time the situation would be clarified. Such a buyer would be able to buy either one of the fifteen pre-certification aircraft or one of the early aircraft from someone who had one of the early "regular" positions and had moved up.

The consequence of all of this is our plans to remarket G-IV, No. 6 have been irretrievably damaged by the ac-

tions by Gulfstream in scheduling these fifteen additional aircraft. We no longer have the advantage of exclusivity among G-IV's to be delivered initially and indeed have the disadvantage of being on the outside while you can manipulate the marketplace in whatever way you see fit.

We are of the firm opinion that the actions taken by Gulfstream are in breach of the implied covenant of fair dealing which are included in every contract. As you know, Gulfstream is clearly on notice of our intentions with regard to the G-IV, No. 6 since we negotiated quite strenuously to obtain position No. 6, and included non-standard provisions in the contract regarding assignment, etcetera.

We are prepared to resolve the situation without litigation if you will within ten days:

(1) Return our deposit, together with accrued interest through that date; and

(2) Pay us $500,000 in settlement of the various claims we have against you for damages.

Please advise.

Yours very truly,
MAYACAMAS CORPORATION

/s/ Roger L. Mosher

RLM:kls
bcc:Gordon Stubbs
Ralph Rodriguez

Gulfstream Aerospace Corporation

P.O. Box 2206, Savannah, Georgia 31402-2206
Telephone: (912) 964-3419 Telex: 546470

Writer's Direct Number
(912) 964-3790

John P. Innes, II
Secretary & General Counsel

Thomas M. Ramee
Assistant General Counsel

August 21, 1985

CERTIFIED MAIL P 374 352 557
RETURN RECEIPT REQUESTED

Mr. Roger L. Mosher
Mayacamas Corporation
525 University Avenue
Suite 1410
Palo Alto, California 94301

Dear Mr. Mosher:

Your certified letter to Hank Stumpf dated August 13, 1985 was received by us subsequent to our mailing to you my August 14, 1985 letter. We hope that our August 14, 1985 letter has answered all of the questions which you addressed in your August 13, 1985 letter.

It now appears certain to us that you believe your contract grants you the sixth Gulfstream IV aircraft built by this Corporation. As we mentioned in our earlier letter, we stand ready, willing, and able to deliver the sixth Gulfstream IV aircraft manufactured by this Company on or before February, 1987 as specified in the contract. Our only request is that we enter into a formal amendment to the contract in order to clarify the captioned reference to "Number G-6" so that there is no question of any ambiguity in the contract.

As to your claim that Gulfstream has "manipulated the marketplace" and thus damaged some business opportunity of Mayacamas, we categorically deny any wrongdoing on the part of Gulfstream. Other than the serial number of the aircraft you claim you contracted for, which we agree to resolve in a manner of your choosing, the relationship between our two companies is clearly and emphatically outlined in the G-IV Sales Agreement dated June 1, 1983. At this point in our inquiry, we have not verified whether or not certain representatives who negotiated the sales agreement with you knew of your interest as a speculator in the Gulfstream IV aircraft. But that also appears irrelevant for although Gulfstream almost exclusively deals with operators of new aircraft, we have a firm policy of treating operators, brokers, and specu-

lators alike. We find absolutely no restriction in the Gulfstream IV Sales Agreement which you executed which would in any way restrict Gulfstream's right to alter its business plan of operation. Furthermore, Gulfstream prides itself on its worldwide reputation for fair dealing. We believe that our offer to you to make the sixth Gulfstream IV available to you either pursuant to the terms of the existing sales contract or per negotiations for an earlier delivery date demonstrates our concern for fairness. We therefore respectfully decline to either return your deposit or to pay you one-half million dollars in settlement of your "various claims".

Gulfstream has fully, and will fully perform its obligations under our contract with Mayacamas Corporation. We expect Mayacamas to do the same. If you continue to believe that we have breached our obligations, please advise us of the nature of the breach so that we can either remove any misunderstanding or cure the purported breach.

We look forward to hearing from you in response to this and our letter of August 14, 1985.

Sincerely,

/s/ John P. Innes, II

Gulfstream Aerospace Corporation
P.O. Box 2206, Savannah, Georgia 31402-2206
Telephone: (912) 964-3419 Telex: 546470

Writer's Direct Number
(912) 964-3206

John P. Innes, II
Secretary & General Counsel

Thomas M. Ramee
Assistant General Counsel

September 3, 1985

VIA FEDERAL EXPRESS

Mr. Roger L. Mosher
Mayacamas Corporation
525 University Avenue
Suite 1410
Palo Alto, California 94301

Dear Mr. Mosher:

Pursuant to our telephone conversation of September 3, 1985 with an attorney from your firm, I herewith attach a copy of our August 21, 1985 letter to you which responds directly to your demands of August 13, 1985. It is our understanding that you had not received this letter when you sent your August 30, 1985 letter to us.

It is also our understanding that your August Progress Payment has not been made. You are, therefore, in default of your Gulfstream Sales Agreement. We will, of course, give you a reasonable time in which to cure this default prior to declaring the entire contract in default.

If you have any questions, please do not hesitate to contact us.

Sincerely,

/s/ John P. Innes, II

JPI:bb
Attachment

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION,
a California Corporation,
Plaintiff,

vs.

GULFSTREAM AEROSPACE CORPORATION, a Georgia Corporation,
Defendant.

CIVIL ACTION NO. C-85-20658

AFFIDAVIT OF M. BRICE LADSON

(Filed November 29, 1985)

STATE OF GEORGIA)
)
COUNTY OF CHATHAM)

Personally appeared before me, the undersigned Notary in and for the County and State first above-mentioned, M. BRICE LADSON, who, being duly sworn, deposes and says:

1. My name is M. Brice Ladson and I have personal knowledge of the matters sworn to in this Affidavit.

2. I am a partner in Bouhan, Williams & Levy, a law firm located in Savannah, Georgia. Our firm was retained by GULFSTREAM AEROSPACE CORPORATION ("GULFSTREAM") to enforce any remedies available to GULFSTREAM due to the failure and refusal of MAYACAMAS CORPORATION (hereinafter "MAYACAMAS") to perform under a contract of sale for a GULFSTREAM IV aircraft.

3. On October 9, 1985, a Complaint was filed in the Superior Court of Chatham County, Georgia (hereinafter the "Georgia" suit), seeking money damages against MAYACAMAS due to its breach of a Sales Contract for a GULFSTREAM IV aircraft dated June 1, 1983. Copies of the Complaint, the Sales Contract, and certain correspondence between the parties, are attached as Exhibit "A" to the November 25, 1985 Affidavit in this case of Thomas M. Rumee, Assistant General Counsel of GULFSTREAM, which documents are incorporated herein by reference.

4. Jurisdiction in the Georgia suit against MAYACAMAS is based upon MAYACAMAS having transacted business in Georgia within the meaning of the Georgia Long Arm Statute, O.C.G.A. Section 9-10-91, a copy of which is attached hereto and made a part hereof as Exhibit "A."

5. The Georgia suit was served on the registered agent of MAYACAMAS, Mr. Roger Mosher, by personal service on his secretaries, on October 24 and November 1, 1985. On November 11, 1985, my Affidavit was filed in the Georgia suit, which outlines all of the efforts by GULFSTREAM's counsel to obtain service of the Georgia suit on MAYACAMAS, through service upon Mr. Mosher, is attached hereto and made a part hereof as Exhibit "B."

6. On November 14, 1985, counsel for MAYACAMAS executed an Acknowledgement of Service of Summons and Complaint in the Georgia suit. MAYACAMAS has thus acknowledged service of the Georgia suit on November 1, 1985. A copy of the Acknowledgement is attached hereto and made a part hereof as Exhibit "C."

7. This lawsuit was filed in California on November 1, 1985, and served on GULFSTREAM in Savannah on November 13, 1985. Accordingly, the Georgia suit was filed three weeks prior to the instant suit, and served two weeks before this suit.

8. GULFSTREAM is requesting that this Court dismiss the instant action, or enter a stay of this action pending the outcome of the Georgia suit, submitting that there are "exceptional circumstances" requiring the parties to litigate this matter in the Georgia forum. These ex-

ceptional circumstances, set forth in many decisions, including that of the Supreme Court of the United States in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 74 L.Ed.2d 765, 780 (1983), include the following:

(a) Inconvenience of the federal forum;

(b) Desirability of avoiding piece-meal litigation;

(c) Order in which jurisdiction was obtained by the concurrent forums;

(d) Absence of any substantial progress in the federal court litigation;

(e) Presence in the suit of extensive rights governed by state law;

(f) Geographical inconvenience of the federal forum.

9. In addition to the fact that the Georgia suit was filed and served substantially prior to the instant case in California, the parties agreed that the Sales Contract of June 1, 1983, which is the subject of this controversy, would be governed by Georgia law (Section 13.3). Thus, two of the factors cited in the *Cone* case, priority of actions and remedies governed by the law of the state forum, support the dismissal or stay of this lawsuit in favor of the Georgia suit.

10. The Georgia suit will also proceed much faster than the instant action under the requirements of O.C.G.A. Section 9-2-46, a copy of which is attached hereto and made a part hereof as Exhibit "D." This statute provides that

the judge of the Superior Court of Chatham County in the Georgia suit shall set the instant case ahead of all other business for trial at the next term of Court, and that no continuance of the trial in excess of thirty days can be granted. Under the authority of O.C.G.A. Section 9-2-46, this case could be tried as early as February of 1986. By contrast, the status conference in the instant action is not scheduled to occur until March 21, 1986. Counsel for GULFSTREAM will schedule within the next week discovery in the form of depositions, interrogatories, request for production of documents and request for admissions, to be conducted in January of 1986. Insofar as the respective progress of the federal and the state actions, therefore, there is much greater likelihood of the Georgia suit proceeding first to trial, thus further supporting GULFSTREAM's motion for dismissal or stay of the instant action.

11. This is a simple suit on a contract for money damages governed by Georgia law. Accordingiy, both parties may obtain all of the relief and remedies they deem appropriate in the Georgia forum. Since there is no question of federal law involved, but only a question of Georgia law, neither party needs access to a federal forum. In this regard, it is submitted that this case is similar to the decision in *Corinthian Pool Corp. v. National Northeast Corp.*, 492 F. Supp. 928 (D.N.H. 1980), in which a motion to stay a federal action in New Hampshire was granted in favor of a prior Massachusetts state action. The desirability of avoiding piecemeal litigation, another factor in the exceptional circumstances test, thus supports the dismissal or stay of the instant action.

12. The California federal forum will certainly be geographically inconvenient for GULFSTREAM. Vir-

tually all of the evidence, with the exception of the presence of Mr. Mosher and MAYACAMAS' records, is located in Chatham County, Georgia. That is where the contract for the sale of the aircraft was to be performed by both parties, where all of GULFSTREAM's records reside, and the current residence of Mr. H. M. Stumpf, Jr., the party who negotiated the contract with MAYACAMAS is located.

13. This Affidavit is given in support of a Motion by GULFSTREAM for dismissal or stay of the instant action pending outcome of the Georgia suit.

/s/ M. Brice Ladson

Sworn to and subscribed
before me this 25th day
of November, 1985.
Gail D. Tucker

GAIL D. TUCKER
Notary Public

Notary Public, Chatham County, Ga.

My Commission Expires Aug. 11, 1986

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

GULFSTREAM AEROSPACE
CORPORATION,

Plaintiff,

vs. CIVIL ACTION NO. X85-3244-B

MAYACAMAS CORPORATION,

Defendant.

AFFIDAVIT OF M. BRICE LADSON

STATE OF GEORGIA
COUNTY OF CHATHAM

Personally appeared before me, the undersigned Notary in and for the County and State first above-mentioned, M. BRICE LADSON, who, being duly sworn, deposes and says:

1. My name is M. Brice Ladson and I have personal knowledge of the facts sworn to in this Affidavit.

2. The Complaint in the within action was filed in the Superior Court of Chatham County, Georgia on October 9, 1985.

3. The Clerk of this Court mailed copies of the Summons and Complaint to the Sheriff of Santa Clara County, California, where the offices of the Defendant, MAYACAMAS CORPORATION, are located, for service upon Mr. Roger L. Mosher, authorized agent to receive service of process for the Defendant. Under Georgia and California law, a corporation, such as the Defendant in this case, MAYACAMAS CORPORATION, can be served by delivering a copy of the process to the person designated as agent for service of process. California Code of Civil Procedure Section 416.10(a) (copy attached).

4. On October 22, 1985, counsel for Plaintiff, noting that nothing had been received by the Clerk of this Court showing service of the Complaint upon the Defendant telephoned the office of the Sheriff of Santa Clara, California, to determine whether the Complaint had been served. At that time, the Sheriff's office informed

counsel for Plaintiff that the Complaint and Summons had not been received.

5. On October 23, 1985, counsel for Plaintiff contacted attorneys in San Francisco, California, to obtain assistance in serving the Summons and Complaint in this case. An additional duplicate original of the Complaint was obtained from the Clerk of this Court and sent to California counsel via Federal Express on October 23, 1985, as is shown by the letter to California counsel from counsel for Plaintiff of October 23, 1985, a true and correct copy of which is attached hereto and made a part hereof as Exhibit "A."

6. California counsel assisting Plaintiff's counsel in this case hired a process server, Mr. Charles J. Stowe, to serve the process in this action upon Mr. Roger L. Mosher at Defendant's offices in Palo Alto, California. Mr. Mosher was unavailable on October 24, 1985, but his secretary, Karen Sutherland, accepted service of the papers on behalf of Mr. Mosher. The notarized Affidavit of Chris J. Stowe showing service of the Complaint on Mr. Mosher is attached and made a part hereof as Exhibit "B."

7. Pursuant to Section 415.20 of the California Code of Civil Procedure, a copy of the Summons and Complaint in this case were sent to Mr. Roger L. Mosher via certified mail, return receipt requested, on October 28, 1985. The Affidavit of Mr. S. J. Llewellyn, dated October 28, 1985, to which is attached the Domestic Return Receipt of the Post Office of the United States, is attached hereto and made a part hereof as Exhibit "C."

8. On October 31, 1985, seven days before substituted service would be effective on November 7, 1985, counsel for Plaintiff telephoned California counsel to inquire concerning the progress of obtaining personal service on Mr. Mosher. It appearing that Mr. Mosher was attempting to evade service of process since he did not appear at his home or office or leave any information as to where he could be located, counsel for Plaintiff directed further efforts to find Mr. Mosher and perfect service before November 7, 1985. On November 1, 1985, again being unable to locate Mr. Mosher, Mr. Walter Steele, a process server hired by counsel for Plaintiff, went to Mr. Mosher's office in Palo Alto, California. At Mr. Mosher's office, a secretary named Dominique Kroon stated to Mr. Steele that she had been authorized by MAYACAMAS CORPORATION and Mr. Mosher to accept service of process, was served with the process in the case by Mr. Steele. Mr. Steele's Affidavit showing such service is attached hereto and made a part hereof as Exhibit "D."

9. Under O.C.G.A. Section 9-10-94, service of process under the Georgia Long Arm Statute was effected as permitted under Georgia law by serving Mr. Mosher's secretaries on October 24 and November 1, 1985. Those secretaries represented to the process servers, Mr. Llewellyn and Mr. Steele, that they were authorized to accept service of process on behalf of Mr. Mosher. In addition, service was effected under California law by mail on November 7, 1985.

10. This Affidavit is given for use as evidence or for any other use authorized by law in the above-captioned case.

THIS 11th day of November, 1985.

/s/ M. Brice Ladson

Sworn to and subscribed
before me this 11th day
of November, 1985.

/s/ Gail D. Tucker
Notary Public, Chatham County, Ga.
My Commission Expires Aug. 11, 1986

BOUHAN, WILLIAMS & LEVY
Attorneys and Counselors at Law
The Armstrong House
Bull & Gaston Streets
Post Office Box 2139
Savannah, Georgia 31498-1001

October 23, 1985

John J. Bouhan
(1866-1971)

Telephone 912/236-2491

Telex 804776

Telecopier 912/233-0811

Robert M. Williams
Samuel A. Cann
Counsel

Ms. Nancy Hudgins
Gordon & Rees
601 Montgomery Street
Suite 400
San Francisco, California 94111

VIA FEDERAL EXPRESS

RE: Gulfstream Aerospace Corporation v.
Mayacamas Corporation
In the Superior Court of Chatham County,
Georgia
Civil Action No. X85-3244-B

Dear Nancy:

Pursuant to our telephone conversation yesterday, enclosed please find the certified, second original Complaint in the above-captioned case.

As we discussed, we would appreciate the assistance of your office in effecting service of this Summons and Com-

plaint. You will note from the attached Summons that Mayacamas Corporation may be served by the service on its registered agent, Mr. Roger L. Mosher, 525 University Avenue, Suite 1410, Palo Alto, California 94301.

I am also enclosing a copy of the section of the Georgia Code which governs service pursuant to the Georgia Long-Arm Statute. Under this section, personal service of the enclosed process can be made in any manner authorized by California law. You told me that California law allows any person to serve process without the necessity of an order appointing them as a proper agent for service of process. Presumably, then, any person from your office can serve the process.

As I mentioned, we would like to effect service on Mayacamas Corporation as soon as possible. In this regard, please call me at your convenience upon receiving this letter should you have any questions or problems concerning service of the enclosed Complaint. If there is any way service can be completed on Friday, we would appreciate that being done.

You will note that we have enclosed two copies of the Complaint and Summons. One of the copies is denominated "Second Original" on the back page of the Summons; the second copy is simply the "Service Copy." Please have your process server serve the Service Copy on Mayacamas Corporation. After service, please prepare an appropriate Affidavit of Service in conformance with California law, have it executed and notarized by the process server, attach it to the Second Original copy of the Complaint, and return these documents to our office for filing in this action.

I enjoyed our conversation yesterday, and am delighted to hear of your success in the litigation area. Many, many thanks for your help.

Yours very truly,

BOUHAN, WILLIAMS & LEVY

/s/ Brice
M. Brice Ladson

MBL:mp
Enclosure

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

GULFSTREAM AEROSPACE CORPORATION,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	NO. X85-3244-B
MAYACAMAS CORPORATION,	)	
Defendant.	)	

ACKNOWLEDGMENT OF SERVICE OF SUMMONS AND COMPLAINT

NOW COMES MAYACAMAS CORPORATION, Defendant in the above-captioned case, and through its duly authorized counsel, hereby acknowledges service and receipt of the Complaint and Summons in this action on November 1, 1985. MAYACAMAS CORPORATION, through counsel, waives any and all further service of process, and service of any other matter pertaining to said action, including notices of time and place of trial, except service of pleadings asserting new or additional claims for relief.

THIS 15 day of November, 1985.

LEE & CLARK

By: /s/ Fred S. Clark
Fred S. Clark

300 Bull Street
Suite 711
Savannah, Georgia 31401
(912) 233-1271

MOSHER, POOLEY, SULLIVAN & HULTQUIST

By: /s/ Gary L. Hultquist by
[Illegible]

By: /s/ Gregory H. Ward by
[Illegible]

525 University Avenue
Suite 1410
Palo Alto, California 94301

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

GULFSTREAM AEROSPACE CORPORATION,	)	
Plaintiff	)	CIVIL ACTION NO. X85-3244-B
vs	)	
MAYACAMAS CORPORATION,	)	(Filed Dec. 13, 1985)
Defendant	)	

ANSWER AND COUNTERCLAIM

—ANSWER—

NOW COMES, MAYACAMAS CORPORATION, Defendant in the above-styled action, making its special appearance and subject to it Motion to Dismiss and other defenses, answers Plaintiff's Compaint as follows:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Complaint is defective due to improper service of process, and for that reason the Complaint should be dismissed.

THIRD DEFENSE

The Complaint is defective due to lack of jurisdiction of this Court over the person of the Defendant, and for that reason the Complaint should be dismissed.

FOURTH DEFENSE

The venue of this action is improper and for that reason the Complaint should be dismissed.

FIFTH DEFENSE

The Complaint is defective in that the activities of Plaintiff have breached the implied warranty under the subject contract to provide goods suitable for the *known* "particular purpose" for which the goods were required by the Defendant, and for that reason the Complaint should be dismissed.

SIXTH DEFENSE

The failure and/or refusal by Plaintiff of providing the goods under the subject contract suitable for the *known* "particular purpose" for which the goods were required by the Defendant, has made the contract unenforceable due to lack of consideration, and for that reason the Complaint should be dismissed.

SEVENTH DEFENSE

The Plaintiff's conduct has resulted in the frustration of the purpose for which the Defendant entered into the contract in question, and for that reason the complaint should be dismissed.

EIGHTH DEFENSE

While reserving the defense that this Court lacks jurisdiction over the Defendant in this matter, the Defendant answers the enumerated paragraphs of Plaintiff's Complaint as follows:

1. Each and every allegation not expressly admitted herein is hereby expressly denied.

2. Defendant admits the allegations contained in paragraphs 1 and 2 of the Complaint.

3. Defendant denies the allegations contained in paragraph 3 of the Complaint.

4. Defendant admits the allegations contained in paragraph 4 of the Complaint.

5. Defendant denies the allegations contained in paragraph 5 of the Complaint.

6. Defendant admits the allegations contained in paragraph 6 of the Complaint.

7. In reference to paragraph 7 of the Complaint, Defendant admits that Gulfstream addressed a letter, dated August 21, 1985, to Defendant, but denies the remaining allegations contained in this paragraph.

8. Defendant admits that portion of the allegations contained in paragraph 8 of the Complaint pertaining to the contract provisions, but denies that portion alleging that the Defendant failed to make the required payment.

9. In reference to paragraph 9 of the Complaint, Defendant admits that a letter dated September 3, 1984 was addressed to Defendant, but denies the remaining allegations contained in this paragraph.

10. Defendant denies the allegations contained in paragraphs 10, 11 and 12 of the Complaint.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant demands this action be dismissed with all costs thereof cast upon the Plaintiff.

— COUNTERCLAIM —

Now comes, MAYACAMAS CORPORATION, making its special appearance and subject to its Motion to Dismiss and other defenses, Counterclaims against GULFSTREAM AEROSPACE CORPORATION, and shows the Court the following:

COUNT ONE

1. In April and May of 1983, GULFSTREAM made the following representations to MAYACAMAS with the intent that MAYACAMAS rely upon said representations:

(a) That its production capacity for producing the new Gulfstream IV aircraft was limited, and GULFSTREAM would not and could not deliver more than approximately one (1) such aircraft every month;

(b) That no Gulfstream IV aircraft would be delivered to a purchaser prior to certification by the Federal Aviation Authority;

(c) That the first Gulfstream IV aircraft would not be delivered until November or December, 1986;

(d) That the sixth Gulfstream IV aircraft would be manufactured, certified, and ready for delivery in February, 1987;

(e) That GULFSTREAM already had more than fifty (50) purchasers for Gulfstream IV aaircraft, and demand for the aircraft would substantially exceed supply throughout 1985, 1986 and 1987;

(f) That as a consequence of the above, the right to purchase and take delivery of the sixth Gulfstream

IV aircraft scheduled for delivery in February, 1987, was of significant value over and above the purchase price of the aircraft; and

(g) That if MAYACAMAS contracted to purchase the sixth Gulfstream IV aircraft, GULFSTREAM would permit MAYACAMAS to transfer or assign its rights under the contract to a third party for value, and would cooperate in any assignment or transfer.

2. As a result of and in reliance upon the above representations by GULFSTREAM, MAYACAMAS entered into the Gulfstream IV Sales Agreement Number G-6 (the "Agreement") with GULFSTREAM in June, 1983, by which MAYACAMAS purchased the sixth Gulfstream IV aircraft to be manufactured, which would be certified and delivered on or before February, 1987, on a limited production and delivery schedule which limited the number of aircraft to be delivered to customers to approximately one (1) every month ("the subject aircraft"). The Agreement provided that MAYACAMAS could assign or transfer its rights under the Agreement.

3. Prior to, at the time of, and after the Agreement was executed, GULFSTREAM knew that:

(a) MAYACAMAS' purpose in entering into the contract was to transfer its right to receive delivery of the subject aircraft to a third party willing to pay a premium or profit to MAYACAMAS for the right to purchase and take delivery of the subject aircraft in February, 1987;

(b) MAYACAMAS' purpose was to transfer its rights in 1985 when demand would be highest; and

(c) Any substantial acceleration or increase by GULFSTREAM in the announced and actual production and delivery schedule for Gulfstream IV aircraft would destroy the purpose for which MAYACAMAS had entered into the Agreement and cause MAYACAMAS to lose revenue and profits.

4. Pursuant to the Agreement, MAYACAMAS has paid a down payment of $673,500.00 to GULFSTREAM.

5. In or before August, 1985, with knowledge of the purpose for which MAYACAMAS entered into the Agreement, GULFSTREAM materially increased its production of Gulfstream IV aircraft, informing MAYACAMAS and the public that fifteen (15) additional, uncertified Gulfstream IV aircraft would be available for sale and delivery to customers prior to the availability of the sixth, certified Gulfstream IV aircraft previously scheduled to be delivered to MAYACAMAS or its designee on or about February, 1987.

6. GULFSTREAM'S announced intention to dramatically increase the number of aircraft to be delivered in 1986, and its announced intention to offer said aircraft for sale and delivery to customers prior to certification, is unprecedented, has eliminated the excess demand for said aircraft that GULFSTREAM represented to MAYACAMAS would be present, and has made it impossible for MAYACAMAS to transfer its right to receive the subject aircraft at a profit.

7. GULFSTREAM's actions have destroyed the subject matter and purpose for which MAYACAMAS entered into the Agreeement, and GULFSTREAM has totally breached the Agreement with MAYACAMAS.

8. As a result of GULFSTREAM's breach of the Agreement, MAYACAMAS has been damaged in an amount to be ascertained, but in no event less than $3,173,500.00.

9. MAYACAMAS has fully performed its obligations under the Agreement, except as excused by GULFSTREAM's breach.

COUNT TWO

10. MAYACAMAS, reserving all rights to which it is entitled by virtue of its defenses and motion to dismiss, hereby realleges and incorporates the allegations contained in paragraphs 1 through 9 above, as if fully set out herein.

11. The representations made by GULFSTREAM to MAYACAMAS were false. The true facts were that:

(a) GULFSTREAM's production capacity for Gulfstream IV aircraft was not limited as represented, and GULFSTREAM could produce and deliver as many as fifteen (15) additional Gulfstream IV aircraft in 1986 if it chose to do so;

(b) GULFSTREAM might deliver Gulfstream IV aircraft before certification by the Federal Aviation Authority;

(c) GULFSTREAM would be delivering the first Gulfstream IV aircraft in mid-1986;

(d) The sixth Gulfstream IV aircraft would be available for delivery in mid-1986 rather than February, 1987;

(e) GULFSTREAM was reserving the right to produce and deliver uncertified aircraft ahead of the promised delivery date for the subject aircraft,

thereby destroying any value in MAYACAMAS's contract rights; and

(f) GULFSTREAM had no intention to permit, and would not permit, MAYACAMAS to transfer or assign for value its rights to the subject aircraft.

12. The representations by GULFSTREAM to MAYACAMAS were made with the intent to deceive and defraud MAYACAMAS, and MAYACAMAS relied upon said representations to its detriment.

13. GULFSTREAM's representations and conduct were willful and malicious, and MAYACAMAS is entitled to exemplary damages according to proof, but in no event less than $3,000,000.00.

COUNT THREE

14. MAYACAMAS, reserving all rights to which it is entitled by virtue of its defenses and motion to dismiss, hereby realleges and incorporates the allegations contained in paragraphs 1 through 13 above, as if fully set out herein.

15. GULFSTREAM's representations were made negligently, and without a reasonable basis for believing them to be true.

COUNT FOUR

16. MAYACAMAS, reserving all rights to which it is entitled by virtue of its defenses and motion to dismiss, hereby realleges and incorporates the allegations contained in paragraphs 1 through 15 above, as if fully set out herein.

17. GULFSTREAM's actions are in breach of its duty of good faith and fair dealing towards MAYACAMAS.

WHEREFORE, MAYACAMAS prays that the Court award MAYACAMAS:

1. The return of its deposit and interest thereon;
2. Compensatory damages according to proof, but not less than $2,500,000.00;
3. Exemplary damages according to proof, but not less than $3,000,000.00;
4. For costs of suit; and
5. For such other and further relief as the Court may deem advisable herein.

LEE AND CLARK, P.C.

By: /s/ Fred S. Clark
Attorney for Defendant

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Attorneys for Plaintiffs and
Counter-Defendant MAYACAMAS CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION, a California Corporation, Plaintiff, vs. GULFSTREAM AEROSPACE CORPORATION, a Georgia Corporation, Defendant.	No. C 85-20658 RPA BRIEF IN OPPOSITION TO MOTION TO DISMISS OR STAY
GULFSTREAM AEROSPACE CORPORATION, a Georgia Corporation, Counter-Claimant, vs. MAYACAMAS CORPORATION, a California Corporation, Counter-Defendant.	Date: January 24, 1986 Time: 9:00 a.m.

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TABLE OF AUTHORITIES

CASES

ISSUE TO BE DECIDED

Whether defendant Gulfstream has satisfied its burden to establish that "exceptional circumstances," as defined by the United States Supreme Court, permit the abandonment of this Court's jurisdiction to adjudicate this diversity action.

INTRODUCTION

Defendant Gulfstream Aerospace Corporation ("Gulfstream") moves this Court for an order staying or dismissing this action in favor of a State Court action now pending in the Superior Court of Chatham County, Georgia. Gulfstream contends that wise judicial administration requires this court to dismiss or stay this case under the authority of *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976).

This Brief will establish that:

1. No "exceptional circumstances" exist which would justify the abandonment of this Court's jurisdiction which Gulfstream requests;

2. The Georgia Courts do not have jurisdiction over Mayacamas; and

3. Because Gulfstream initiated this transaction in the Northern District through its Vice President who was residing in San Mateo, and because Mayacamas is the real plaintiff, it would be also inappropriate for this Court to stay this action, even if the Georgia Courts did have jurisdiction.

ARGUMENT

I

NO EXCEPTIONAL CIRCUMSTANCES EXIST WHICH WOULD JUSTIFY THE ABANDONMENT OF THE COURT'S OBLIGATION TO DECIDE A CONTROVERSY OVER WHICH IT HAS JURISDICTION

Defendant's motion fails to demonstrate that "exceptional circumstances" exist which would permit the court to ignore the virtually unflagging obligation of the federal courts to exercise the jurisdiction given to them by the United States Constitution. While early pronouncements of the Supreme Court suggested that the federal courts could never decline to exercise jurisdiction over controversies properly before them, this view has been changed by certain limited exceptions. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976) a limited exception was recognized, resulting from considerations of "wise judicial administration." The Supreme Court reaffirmed that "[t]he doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id.* at 813, quoting *County of Allegheny v. Frank Mashuda Company*, 360 U.S. 185, 188, 79 S.Ct. 1060, 1063 (1959). The court recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in federal court, since the latter has "the virtually unflagging obligation" to exercise its jurisdiction. *Id.* at 817. "Abdication of the obligation to decide cases can be justified under [the abstention] doctrine only

in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Id.* at 813, quoting *County of Allegheny*, 360 U.S. at 189.

Given the "virtually unflagging obligation" to exercise jurisdiction, the court in *Colorado River* held that the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration "are considerably more limited than the circumstances appropriate for abstention." *Id.* at 818. In making the decision to grant or deprive a litigant of a federal forum the court must make "a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise . . . . Only the clearest of justifications will warrant dismissal." *Id.* at 818-819.

In *Colorado River* and, subsequently, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927 (1983), the Court discussed various factors relevant to this decision and noted that "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 16.

The Supreme Court found the requisite "exceptional circumstances" and "clearest of justifications" for dismissal in *Colorado River* by virtue of the particular statute at issue in that case, the McCarran Amendment. This Amendment evidenced a federal policy to avoid piecemeal

adjudication of water rights, and considering the existence of an established system in the state for adjudicating and managing water rights, the multitude of defendants, the voluntary participation by the United States in ongoing state water adjudication, as well as other factors, dismissal was warranted. *Colorado River,* 424 U.S. at 819-820; see, *Kittitas Reclamation District v. Sunnyside Valley Irrigation,* 763 F.2d 1032, 1035 n.3 (9th Cir. 1985).

In its supporting Brief, defendant sets forth a number of factors which "suggest that this Court should exercise its discretion to dismiss or stay the present federal court action." Brief in Support of Motion to Dismiss or Stay at 8:2-3. These factors, neither singularly or collectively, create exceptional circumstances warranting the abandonment of this court's obligation to adjudicate this matter.

1. *Absence of Federal Claim*

Federal jurisdiction in the instant case is founded upon diversity of citizenship, the plaintiff being a citizen of the Northern District of California, the defendant being a resident of Georgia. Jurisdiction properly rests with this court, despite the absence of any federal claim. While the existence of a federal claim may direct that a District Court not stay or dismiss an action, the absence of such a claim cannot dictate abstention, nor should it be a factor weighing against the acceptance of jurisdiction. "[U]ntil Congress decides to alter or eliminate the diversity jurisdiction, we are not free to treat the diversity litigant as a second-class litigant, and we would be doing just that if we allowed a weaker showing of judicial economy to justify abstention in a diversity case than in a federal-question

case." *Evans Transportation Company v. Scullin Steel Company,* 693 F.2d 715, 717 (7th Cir. 1982).

2. *Applicability of Georgia Law*

While the contract which is the subject of the complaint provides that it is to be construed and interpreted in accordance with the laws of Georgia, it is not exceptional that the federal court should be called upon to refer to state law. Moreover, the reference to Georgia law rather than California law "is not a very important factor, especially as it seems that the main issue in these cases will be governed by the Uniform Commercial Code, which is in force in both states." Cf. *Evans Transportation Company,* 693 F.2d at 720.

3. *Priority of Georgia Action*

Defendant argues that the earlier filing of the Georgia action provides a basis for relinquishment of jurisdiction by this court. The "priority" factor, however, is not measured by the order of filing but rather by recognition of how much progress has been made in the two actions. *Moses H. Cone,* 460 U.S. at 21. In the instant case, the complaints were filed approximately one month apart. "The order of filing, however, has little significance by itself. . . . If we gave weight to the fact that [plaintiff] filed its complaint a month after [defendant] we would be signaling future litigants in [plaintiff's] position that when sued they had better stay up all night and file their countersuit the next day rather than the next month. There is no point in inviting such races, and little precedent for doing it here." *Evans Transportation Company,* 693 F.2d at 718-719.

Neither the state action nor the instant case are at such an advanced stage that this factor weighs in favor of one side or the other. " 'The mere existence of a case on the state docket in no way causes a substantial waste of judicial resources nor imposes a burden on the defendant' which would justify abstention." *Herrington v. County of Sonoma*, 706 F.2d 938, 940 (9th Cir. 1983). It is not a basis to stay a federal suit merely to avoid having two active lawsuits instead of one. "That will always be possible when there is a parallel state suit pending." *Evans Transportation Company*, 693 F.2d at 717.

More importantly, it is clear from the facts that Mayacamas is the true plaintiff and that Gulfstream's Georgia action is a tactical maneuver to gain some expected advantage or leverage over Mayacamas. Gulfstream still holds Mayacamas' deposit of $675,000, which it has refused to return. See the Declaration of Gary L. Hultquist filed herewith.

4. *Sufficiency of Georgia Action*

This factor is essentially a restatement of defendant's assertion that the absence of any federal claim mandates dismissal of the federal action. Again, if it were found that plaintiff could not litigate its claims in Georgia, this factor would direct the denial of defendant's motion to dismiss. It is not an "exceptional circumstance" that the causes of action may be litigated in either forum, and it is equally true that all of defendant's claims will be fully and expeditiously litigated in the instant federal action.

5. *Forum Convenience*

While a few witnesses and documents are located in Georgia, the key non-party witnesses and documents are

located in Northern California and the key Gulfstream witness travels to California on Gulfstream business. See Declaration of Gary L. Hultquist, filed herewith. Mayacamas' only place of business and its Chief Executive Officer are also located in the Northern District. Thus, the convenience factor favors retention of jurisdiction. In any event, one party will be inconvenienced no matter what this court decides. See, *Coatings, Inc. v. National Co'd Drawn, Inc.*, 611 F. Supp. 958, 960 (E.D. Wis. 1985)

Gulfstream should bear the inconvenience because it initiated the transaction in the Northern District by its officer or agent who resided in the Northern District at the time. See Affidavit of Roger L. Mosher in Support of Motion to Dismiss for Lack of Jurisdiction, attached to the Hultquist Declaration.

6. *Commencement of Georgia Discovery*

Gulfstream has begun discovery in the Georgia action; however, the action has not made any substantial progress so as to justify dismissal of the federal action.

Furthermore, Mayacamas has initiated discovery in this proceeding, requesting relevant Gulfstream documents. In December, Mayacamas noticed the deposition of Gulfstream's key witness, H. L. Stumpf, Jr.; however, Gulfstream refused to produce Mr. Stumpf in California, nor on the date requested in the notice. In a spirit of cooperation, Mayacamas is still attempting to obtain Mr. Stumpf's deposition in California in mid-January. See Hultquist Declaration filed herewith.

Mayacamas intends to prosecute this action with vigor. If Gulfstream does not delay production of its documents,

Mayacamas believes it can complete discovery and be prepared for trial in this Court within six months, or as soon thereafter as the Court's calendar would permit. There is no reason to believe that the Georgia action could be brought to trial any sooner, nor any reason to believe a month or so difference in discovery or trial schedules is material.

7. *Federal Action as Tactical Maneuver*

Defendant finds a "defensive tactical maneuver" in plaintiff's filing of the instant action and argues that such a reactive suit should influence this court's decision. The language in *Moses H. Cone,* however, clearly indicates that this factor is only of significance when the federal suit was "based on a contrived federal claim," and where a stay, therefore, was necessary in order "to deter vexatious use of the federal courts." *Moses H. Cone,* 460 U.S. at 17, n. 20. As discussed above, Mayacamas is the real plaintiff and Gulfstream's Georgia action is the tactical maneuver. Gulfstream was informed of its breach on August 13, 1985, by letter from Roger L. Mosher, a copy of which is attached as Exhibit C to the affidavit of Thomas M. Ramee. Gulfstream's earlier service of process is immaterial, merely being evidence of the lengths to which Gulfstream will go to avoid having to face trial on the merits in this Court.

As stated above, the task of this court is "to ascertain whether there exists 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Moses H. Cone,* 460 U.S. at 25-26 (emphasis in original). Analysis

of the above factors does not warrant a stay or dismissal of this action.*

Defendant relies heavily on *Microsoftware Computer Systems, Inc. v. Ontel Corp.,* 686 F.2d 531 (7th Cir. 1982) in arguing that these factors call for dismissal; however, the *Microsoftware* case has been seriously undermined by subsequent Seventh Circuit decisions, to the extent where at least one district judge has stated that he does not know what the standard is in that circuit and another district judge has ignored it.

In *Microsoftware* the court found that a stay of the federal proceedings was appropriate where there was no peculiar federal interest and there was no reason to believe that the state court could not fully and fairly resolve the parties' dispute. *Microsoftware,* 686 F.2d at 537-538. The court stated that "there would be a grand waste of efforts by both the courts and the parties in litigating the same issues regarding the same contract in two forums at once." *Id.* at 538.

In dissent, the Honorable James E. Doyle remarked that the court's decision "turns on its head" the history and controlling authority of the abstention doctrine. *Id.* at 539. He noted that there were a "number of meritorious considerations" in favor of the state court forum but that the action was "distinctly unexceptional" and "fails miserably as the occasion for the pronouncement of a new

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* While no justification exists for a stay or dismissal of the federal action, if there were the action should be stayed rather than dismissed. *Evans Transportation Company,* 693 F.2d at 717; *Weiner v. Shearson, Hamnill & Company, Inc.,* 521 F.2d 817, 821 (9th Cir. 1975); *McGreghar Land Company v. Meguiar,* 521 F.2d 822, 824 (9th Cir. 1975).

limitation upon the power of the national courts." *Id.* at 540.

The *Microsoftware* decision was followed by *Voktas, Inc. v. Central Soya Company, Inc.*, 689 F.2d 103 (7th Cir. 1982) and *Evans Transportation Company.* These cases reaffirmed the strict standard set by *Colorado River* and undercut several of the notions advanced in *Microsoftware.* In *Green v. Indal, Inc.*, 565 F.Supp. 805 (S.D. Ill. 1983), the court confessed that "[d]espite the panoply of guideposts generated by these recent opinions, it is not completely clear how discretion is to be used." *Green*, 565 F.Supp. at 807-808. The court ultimately concluded that *Microsoftware* had continued vitality only when a stay of the federal action would not definitely foreclose the federal forum to the claimant. Under such circumstances, the law of the Seventh Circuit would permit a stay to be granted purely for reasons of judicial economy, without the need for a showing of "exceptional circumstances".* *Id.* at 809. The district court then applied what it called a "watered-down threshold" and nevertheless *declined to stay the action before it!*

Colorado River, however, does not permit the application of such a watered-down threshold. As noted in *Coatings*, 611 F.Supp. at 960, "the Supreme Court has not retreated from the proposition that a federal court may decline to exercise its jurisdiction because of parallel state court litigation only in exceptional circumstances." The

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* The court in *Green* admitted that this interpretation of the Seventh Circuit caselaw could be wrong and that "exceptional circumstances" would then have to be shown. *Green*, 565 F.Supp. at 809 n.8.

district court in *Coatings* referred to the concern expressed by its appellate court in *Microsoftware* over the "grand waste of efforts" attendant to the maintenance of two similar actions, but ignored this concern, stating that such a consideration was always present whenever a federal court is asked to abstain. "The fact that the two actions are duplicative can hardly be said to be exceptional or this factor would swallow the rule." *Id.*

The Ninth Circuit, in contrast to the Seventh Circuit, has always scrupulously followed the strict requirements of *Colorado River.* In *Tovar v. Billmeyer,* 609 F.2d 1291 (9th Cir. 1979), *cert. denied,* — U.S. —, 105 S.Ct. 223 (1984), it was held that in determining whether a stay is appropriate the court must focus on whether exceptional circumstances exist such that the refusal to say the action would result in adverse consequences. Gulfstream has not and cannot show "adverse" consequences within the meaning of the Ninth Circuit rule.

Similarly, in *Herrington,* the court rightfully looked to determine whether the case before it presented exceptional circumstances in light of the considerably limited nature of the "prudential abstention" doctrine. The court reversed a district court ruling which stayed the federal proceedings, finding that the action was not an exceptional case. *Id.* at 940.

It cannot be said that the instant case is an exceptional one. It is not an attempt to break up larger litigation into smaller actions with resulting piecemeal litigation. The federal forum is not inconvenient. The action cannot be considered as vexatious. The state action has not significantly progressed beyond the federal matter. In these

regards this case is remarkably similar to that considered by the Seventh Circuit in *Voktas.**

II

THE GEORGIA COURT LACKS JURISDICTION

Although a stay of this action would not be justified even if the Georgia Court had jurisdiction, the Georgia Court lacks jurisdiction over this matter. Mayacamas has filed its motion to dismiss for want of jurisdiction in the Chatham County Court, a copy of which is attached to the Hultquist Declaration filed herewith. Mayacamas has not transacted business in Georgia so as to submit to the jurisdiction of the Georgia courts, and a dismissal or stay of a federal suit is improper if there is not jurisdiction in the state action to adjudicate the claims at issue in the federal suit. *Silberkleit v. Kantrowitz,* 713 F.2d 433, 436 (9th Cir. 1983). The Chatham County Superior Court has set the motion for hearing on January 30, 1986.

CONCLUSION

Gulfstream initiated the subject transaction by a meeting in the Northern District between Mayacamas' President and Gulfstream's Regional Vice President who lived

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* In *Voktas* the court discussed the difference between "repetitive" and "reactive" lawsuits. In the former the state and parallel federal actions are brought by the same plaintiff, and a stay simply places the plaintiff in the position of having to decide in which of the two forums to pursue his claims. The court found at *Colorado River* did not distinguish between the two types of lawsuits, requiring the "clearest of justifications" in granting a stay in both instances. In any event, the instant action is not "repetitive" and plaintiff has an interest in pursuing its claim in a local forum. See *Coatings,* 611 F.Supp. at 961.

in San Mateo. All of Mayacamas' involvement with the transaction occurred in the Northern District and the contract was executed by Mayacamas in Palo Alto. Thus, there is no unfairness or undue burden to Gulfstream in litigating the dispute in this action.

It is ironic that Gulfstream protests having to answer to this Court. When Gulfstream was soliciting the sale of its products to Mayacamas, its officer was residing in San Mateo, with an office in this District and in Los Angeles. Having obtained Mayacamas' deposit in Palo Alto, Gulfstream now wants Mayacamas to have to go to Georgia to get it back. The Court should reject this arrogance. Mayacamas is the real plaintiff and this Court should not allow Gulfstream's Chatham County maneuver to succeed.

Gulfstream has failed to meet its burden of establishing the "exceptional circumstances" and "adverse consequences" which would permit this Court to stay this action.

Based on the foregoing, defendant's motion to dismiss or stay this action should be denied.

Dated: January 10, 1986

Respectfully Submitted,

Mosher, Pooley, Sullivan & Hultquist

By /s/ Gary L. Hultquist
Gary L. Hultquist

18-may1601-02

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Attorneys for Plaintiff
and Counter-Defendant
MAYACAMAS CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION, a California corporation, Plaintiff, vs. GULFSTREAM AEROSPACE CORPORATION, a Georgia corporation, Defendant.	NO. C 85 20658 RPA DECLARATION OF GARY L. HULTQUIST IN OPPOSITION TO MOTION TO DISMISS OR STAY
GULFSTREAM AEROSPACE CORPORATION, a Georgia corporation, Counter-Claimant, vs. MAYACAMAS CORPORATION, a California corporation, Counter-Defendant.	Date: January 24, 1986 Time: 9:00 a.m.

I, GARY L. HULTQUIST, declare:

1. I am an attorney duly licensed to practice law in the State of California and before this Court, and am a partner in the law firm of Mosher, Pooley, Sullivan & Hultquist, attorneys of record for Plaintiff MAYACAMAS CORPORATION in this case. I have personal knowledge of the matters set forth herein, and if called upon as a witness could testify thereto under oath.

2. The Affidavit of Roger L. Mosher in Support of Motion to Dismiss for Lack of Jurisdiction, filed by MAYACAMUS in the Chatham County Superior Court action in Georgia, is attached as Exhibit A to this Declaration for the purpose of setting forth the background of this dispute, particularly the following relevant matters:

a) MAYACAMAS has not been in the State of Georgia in connection with this transaction;

b) GULFSTREAM initiated this transaction in this District by its officer who resided in and conducted business from San Mateo, California;

c) MAYACAMUS executed the contract in Palo Alto, California, and GULFSTREAM's representative picked up the MAYACAMAS deposit checks in Palo Alto, California;

d) Subsequent to the execution of the contract, GULFSTREAM wrote to MAYACAMAS in Palo Alto re: GULFSTREAM's Los Angeles office and from GULFSTREAM's home office in Georgia;

e) GULFSTREAM directed MAYACAMAS to send subsequent contract payments to GULF-

STREAM's bank in Chicago, Illinois, not to Georgia; and

f) The key non-party witness in this litigation is located in this District in San Francisco.

3. GULFSTREAM still holds $675,000.00 deposited by MAYACAMAS. MAYACAMAS demanded the return of the deposit and damages, and threatened to enforce its rights it its demand was not met, in August 1985, approximately two months before GULFSTREAM filed its action in Chatham County Superior Court in Georgia.

4. The assertion by GULFSTREAM that the instant action is a tactical maneuver by MAYACAMAS to avoid being a defendant in the Georgia action is untrue. This action was prepared and filed because MAYACAMAS is the true plaintiff in this dispute and believes it is entitled to the return of its deposit of $675,000.00, as well as damages. The Georgia action was filed before the instant action only because I had not completed the drafting of the Complaint herein due to more time-sensitive matters for other clients.

5. I do not believe there will be any substantial difference in the progress of the two actions. We are preparing interrogatories and a request for production of documents for response in early February at a reasonable interval after the hearing on the instant motion. Unless there is an inordinate delay by GULFSTREAM we believe MAYACAMAS will be prepared to go to trial in this matter within six months. Depending upon GULFSTREAM's responses to interrogatories, it may be necessary to take the depositions of some GULFSTREAM customers and other witnesses in the industry to establish certain facts.

Although we believe that discovery can also be completed within the above schedule, any delay in such matters would present in either action.

6. GULFSTREAM has already attempted to obtain discovery concerning MAYACAMAS' contentions in this action by serving contention interrogatories in the Georgia action directed at the Complaint in the instant matter. Although we have objected to said improper discovery request, it is apparent that GULFSTREAM was attempting to obtain discovery concerning this action while taking the position on the instant motion that discovery in the Georgia action was proceeding at a faster pace.

7. We have attempted to obtain discovery in this action, to no avail. We noticed the deposition of GULFSTREAM's key witness in December; however, GULFSTREAM's counsel Robert Stumpf telephoned to advise me that GULFSTREAM would not produce Mr. Stumpf for his deposition as noticed in California because GULFSTREAM did not believe it was obligated to produce Mr. Stumpf in California, and because the date was inconvenient. I have had subsequent conversations with GULFSTREAM's Georgia counsel, Mr. Brice Ladson, concerning the possibility that we can depose Mr. Stumpf in California in Los Angeles during a trip that Mr. Stumpf may be making to California at that time. Mr. Ladson has indicated that Mr. Stumpf may have been planning a trip to Los Angeles in mid-January, but as of this date, Mr. Ladson has not confirmed whether the trip is still being planned, or whether Mr. Stumpf will have time for the deposition during that trip. In any event, MAYACAMAS will proceed expeditiously with discovery, and will be prepared to go to trial as indicated herein.

8. MAYACAMAS' motion to dismiss the Georgia action is attached hereto as Exhibit B.

Executed on January 10, 1986, in Palo Alto, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Gary L. Hultquist
Gary L. Hultquist

EXHIBIT A

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

GULFSTREAM AEROSPACE CORPORATION, Plaintiff, vs. MAYACAMAS CORPORATION, Defendant.	CIVIL ACTION NO. X85-3244-B

AFFIDAVIT OF ROGER L. MOSHER IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

State of California)
County of Santa Clara) ss.

ROGER L. MOSHER, being first duly sworn, deposes and says:

1. I am President of MAYACAMAS CORPORATION and I have personal knowledge of the matters set forth herein, and if called upon as a witness could testify thereto under oath.

2. MAYACAMAS is a California corporation which was formed in 1981.

3. The first contact between MAYACAMAS and GULFSTREAM occurred on April 20, 1983, in San Francisco, California, when Henry Stumpf, Jr., GULFSTREAM's Regional Sales Manager, met with me in the offices of San Francisco Avia, during which we discussed, inter alia, the possible purchase of a GIV aircraft from GULFSTREAM.

4. At the time of our first meeting with Mr. Stumpf, and during the subsequent negotiations and execution of the contract, Mr. Stumpf was residing in San Mateo, California. In addition to an office in or near his home in San Mateo, Mr. Stumpf and GULFSTREAM were maintaining an office in Los Angeles, California.

5. As a result of the meeting between MAYACAMAS and GULFSTREAM in San Francisco on April 20, 1983, and an offer from GULFSTREAM made at said meeting, MAYACAMAS decided to accept GULFSTREAM's offer to hold certain aircraft for MAYACAMAS pending contract negotiations. At Mr. Stumpf's express request, we confirmed our acceptance by Telex to GULFSTREAM in Savannah, stating that our deposits were ready for delivery at my office in Palo Alto, California.

6. There was a subsequent Telex by MAYACAMAS to GULFSTREAM in Savannah when GULFSTREAM backed out of the commitments made by Mr. Stumpf; however, on April 25, 1983, I wrote to Mr. Stumpf at the Los Angeles address he had given me, restating the terms of the agreement, and enclosing two deposit checks. A copy of this letter is attached hereto as Exhibit A.

7. There were subsequent telephone conversations between MAYACAMAS and Mr. Stumpf concerning the agreement of April 22nd, and I believe all those telephone conversations occurred with both parties in the State of California.

8. Then, on May 11, 1983, after a telephone conversation between myself and Mr. Stumpf, I wrote to Mr. Stumpf at GULFSTREAM's San Mateo address, again confirming the latest discussions in the matter. A copy of this letter is attached hereto as Exhibit B.

9. After May 11th, and more discussions, GULFSTREAM supplied a proposed Gulfstream IV Sales Agreement to us in California for our review. After our review and discussions concerning revisions thereto, I executed the Gulfstream IV Sales Agreement Number G — 6 in my Palo Alto office on June 1, 1983. Mr. Stumpf picked up the executed agreement and the down payment in my Palo Alto office.

10. By executing a contract with GULFSTREAM in California, which contained a Georgia choice-of-law provision, MAYACAMAS did not intend to subject itself to the jurisdiction of Georgia's courts. It was and is my understanding that GULFSTREAM requires said choice-of-law provision in all of its Sales Agreements.

11. By letter of October 29, 1984, Mr. Stumpf mailed an amendment to the contract to me at my Palo Alto office, where I executed the amendment and returned it to Mr. Stumpf by mail at his request.

12. On or about December 4, 1984, I received a letter from GULFSTREAM's Regional Vice President, J. Michael Paulson, providing MAYACAMAS with information concerning the Gulfstream IV, and inviting me to telephone him at GULFSTREAM's regional office in Los Angeles, California. A copy of the December 4, 1984 letter from Mr. Paulson is attached hereto as Exhibit C.

13. On July 10, 1985, I received an invoice from GULFSTREAM for a progress payment under the contract, directing MAYACAMAS to wire the payment to GULFSTREAM's account at the First National Bank of Chicago in Chicago, Illinois. A copy of the invoice is attached as Exhibit D.

14. On August 13, 1985, after having learned from Mr. Stumpf by telephone that GULFSTREAM had breached its contract with MAYACAMAS, I wrote to GULFSTREAM demanding the return of our deposit with interest, and a further sum in settlement of claims by MAYACAMAS against GULFSTREAM. A copy of my August 13, 1985 letter is attached hereto as Exhibit E.

15. Subsequent correspondence did not result in any settlement, and attorneys for MAYACAMAS wrote to GULFSTREAM on August 30, 1985, notifying GULFSTREAM that MAYACAMAS' offer of settlement would expire on September 10, 1985. A copy of the letter from MAYACAMAS' attorneys dated August 30, 1985 is attached hereto as Exhibit F.

16. MAYACAMAS has been severely and substantially damaged by GULFSTREAM's unprecedented conduct in offering additional Gulfstream IV aircraft for sale and delivery in advance of or concurrent with the early delivery date and exclusive rights that MAYACAMAS bargained for. As the attached correspondence with GULFSTREAM indicates, MAYACAMAS initiated discussions with GULFSTREAM concerning this dispute, and made an early settlement demand which was ignored by GULFSTREAM. As a result, MAYACAMAS asked its attorneys to commence litigation against GULFSTREAM, and MAYACAMAS filed its action in the United States District Court, Northern District of California, on November 1, 1985. A copy of MAYACAMAS' Complaint is attached hereto as Exhibit G.

17. Although GULFSTREAM's actions have destroyed the purpose for which MAYACAMAS entered into the agreement, and have caused damage to MAYACAMAS, I am informed and believe, and thereupon state that GULFSTREAM will suffer no injury from MAYACAMAS' decision to treat GULFSTREAM's conduct as a breach. In fact, GULFSTREAM is holding deposits of MAYACAMAS in the amount of $673,500.00, having received those payments in May and October, 1984.

18. Although MAYACAMAS is the real plaintiff in this dispute, GULFSTREAM has filed its Counter-Claim in the California action. A copy of GULFSTREAM's Counter-Claim in the California action is attached hereto as Exhibit H.

19. MAYACAMAS consummated this transaction in California with GULFSTREAM's representatives in

California. There have been no visits to Georgia by MAYACAMAS or its representatives in connection with this transaction.

Executed on December 12, 1985, at Palo Alto, California.

/s/ ROGER L. MOSHER
President, MAYACAMAS CORPORATION

State of California)
County of Santa Clara) ss.

On December 12, 1985, before me, the undersigned, a Notary Public in and for said State, personally appeared ROGER L. MOSHER, personally known to me, or proved to me on the basis of satisfactory evidence, to be the person whose name is subscribed to the within instrument, and acknowledged that he executed it.

WITNESS my hand and official seal.

/s/ TAMRA ROBERTS
Notary Public

OFFICIAL SEAL
TAMRA ROBERTS
Notary Public-California
SANTA CLARA COUNTY
My Comm. Exp. Feb. 3, 1988

MAYACAMAS CORPORATION
525 University Avenue, Suite 1410
Palo Alto, California 94301

April 25, 1983

Gulfstream Aerospace Corporation
1875 Century Park, East
Suite 2330
Los Angeles, California 90067
Attn: H. M. Stumpf, Jr.
Vice President

Dear Hank:

This letter reiterates the intentions of this corporation to purchase two Gulfstream IV aircraft from your company per our discussions of last week which was confirmed in the telex sent by Gordon Stubbs on our behalf last Friday. You have informed up today that your company does not regard itself as bound to honor the commitment we feel was made regarding the Gulfstream IV. prototype/demonstrator unit referenced in the telex.

Notwithstanding your company's present position with regard to the demonstrator, we are enclosing two checks of $100,000. each; one for the demonstrator, the other for the Gulfstream IV. Unit #50. Based on our earlier conversation, we presume that you will be returning the check relating to the demonstrator.

However, if you accept and negotiate the check for Unit #50, we understand that: (1) the deposit on Unit IV. #50 is subject to the negotiation and execution of a purchase agreement for the aircraft acceptable both to Gulfstream and us, failing which, the $100,000. deposit will be refundable to us; and (2) tender of the deposit and your acceptance of it respecting Unit #50 will have no effect upon our rights with regard to the demonstrator unit.

We are sincerely sorry that our business relationship must commence on this note.

Yours very truly,

MAYACAMAS CORPORATION

/s/ Roger L. Mosher

RLM:ks-s
cc: File

bcc: Gordon L. Stubbs
c/o S.F. Avia

EXHIBIT B

MAYACAMAS CORPORATION
525 University Avenue, Suite 1410
Palo Alto, California 94301

May 11, 1983

Mr. Hank Stumpf, Jr.
Vice-President
Gulfstream Aerospace Corporation
485 Dorchester Road
San Mateo, CA 94402

Dear Hank:

This confirms our conversation today about our interest in the next Gulfstream IV demonstrator which may become available for purchase and lease back within the next few months.

As you know, we are quite firm in our belief that we were committed the first Gulfstream IV demonstrator based upon our various discussions during the week of April 18 - 22, which culminated in the advice by you on April 22nd that both the first demonstrator and Unit Number 50 were available. We have previously expressed our extreme disappointment in learning on April 25th that the demonstrator has apparently been committed to others unbeknownst to you.

Thus to partially ameliorate our disappointment at losing the first Gulfstream IV demonstrator, we initially proposed that Unit Number 50, which we presently have on hold, be converted to a demonstrator and that we purchase outright an earlier Serial Number. You have advised that the Gulfstream management has not yet decided when or if to schedule the next IV demonstrator. In light of that, we would be prepared to leave it that we will have a right of first refusal to acquire the next IV demonstrator, whatever number is turns out to be. This would mean only that we would have the first opportunity to negotiate the terms of purchase and lease back with your company.

We also look forward to hearing from you next week concerning the availability of a IV Unit in the #10 - 15 neighborhood.

Yours very truly,

MAYACAMAS CORPORATION

/s/ Roger L. Mosher

RLM:tmf
cc: C. Vogeley
bc: Gordon Stubbs
S. F. Avia

EXHIBIT C

GULFSTREAM AEROSPACE CORPORATION
P.O. Box 2206, Savannah, Georgia 31402-2206
Telephone: (912) 964-3000 Telex: 546470

December 4, 1984

Mr. Roger L. Mosher
President
Mayacamas Corporation
Suite 1410
525 University Avenue
Palo Alto, California 94301

Dear Mr. Mosher:

Since publication of our first Gulfstream IV Progress Report in May, several significant events in this program have occurred. To keep you informed of our progress on this exceptional executive jet aircraft, we have enclosed our second Progress Report for your review.

The Program is on schedule and in some areas, ahead of schedule. Our enclosed Progress Reports shows 60 orders for the Gulfstream IV when we went to press in September. Today, we have over 70 orders with commitments for an additional 26 aircraft.

We have covered several subjects in this Progress Report which we think you will find of interest:

- the highly successful Rolls-Royce Tay engine Program
- our new ten year airframe warranty
- the full scale Gulfstream IV fuselage Mock-Up

The reception to the Mock-Up at the NBAA Convention in Atlanta was quite enthusiastic. The Mock-Up is now on tour to several major cities throughout the United States.

If you would like additional information about the Gulfstream IV or the Mock-Up schedule, I will be pleased to assist you. You may call me at (213) 556-8146. Our Regional Office address is 1875 Century Park East, Suite 2330, Los Angeles, California 90067.

Sincerely,

/s/ J. Michael Paulson
Regional Vice President

Enclosure
JMP/ek

EXHIBIT E

MAYACAMAS CORPORATION
525 University Avenue, Suite 1410
Palo Alto, California 94301

August 13, 1985

VIA CERTIFIED MAIL

Mr. H. M. Stumpf, Jr.
Senior Vice President - Marketing
GULFSTREAM AEROSPACE CORPORATION
P. O. Box 2206
Savannah, GA 31402-2206

Dear Hank:

This confirms our telephone conversation on Monday, August 12, 1985 concerning the status of our G-IV contract.

As I told you, subsequent to our conversation of several weeks ago, wherein for the first time you advised of Gulfstream's intention to manufacture fifteen pre-certification G-IV aircraft with delivery commencing April or May of 1986, and to offer them for sale.

At the time of our conversation you indicated that Gulfstream would be prepared to let us "move up" to one of the positions in the pre-certification aircraft if:

(1) We were to accelerate the deposit schedule: and

(2) Agree that finishing work on the aircraft be done at Gulfstream inasmuch as the aircraft could not fly prior to certification.

In considering this as a possible alternative we have concluded that the financial and other risks involved in "moving up" are such that interms of having an operable airplane, it is not much better than retaining the present position which is (according to your statement) an aircraft to be deliverable in March, 1987.

On the other hand, we have examined the possibility of retaining the present position and effecting a sale of our position in the Fall of this year as we had all along planned to do. We find the presence of these additional fifteen aircraft to be an incredible barrier to getting potential G-IV buyers or lessees interested. Because of all of the uncertainty in the marketplace, and the confusion as to just who is taking which airplane, such a buyer would be well advised to wait until the Fall of 1986 or even later at which time the situation would be clarified. Such a buyer would be able to buy either one of the fifteen pre-certification aircraft or one of the early aircraft from

someone who had one of the early "regular" positions and had moved up.

The consequence of all of this is our plans to remarket G-IV, No. 6 have been irretrievably damaged by the actions by Gulfstream in scheduling these fifteen additional aircraft. We no longer have the advantage of exclusivity among G-IV's to be deliverey initially and indeed have the disadvantage of being on the outside while you can manipulate the marketplace in whatever way you see fit.

We are of the firm opinion that the actions taken by Gulfstream are in breach of the implied covenant of fair dealing which are included in every contract. As you know, Gulfstream is clearly on notice of our intentions with regard to the G-IV, No. 6 since we negotiated quite strenuously to obtain position No. 6, and included non-standard provisions in the contract regarding assignment, etcetera.

We are prepared to resolve the situation without litigation if you will within ten days:

(1) Return our deposit, together with accrued interest through that date; and

(2) Pay us $500,000 in settlement of the various claims we have against you for damages.

Please advise.

Yours very truly,

MAYACAMAS CORPORATION

/s/ Roger L. Mosher

RLM:kls

bcc:Gordon Stubbs
Ralph Rodriguez

EXHIBIT F

MOSHER, POOLEY, SULLIVAN & HULTQUIST
Attorneys
525 University Avenue
Suite 1410
Palo Alto, California 94301
(415) 327-0500
Telecopier: (415) 323-3835

August 30, 1985

VIA FEDERAL EXPRESS

John P. Innes, II, Esq.
Secretary and General Counsel
GULFSTREAM AEROSPACE CORPORATION
Post Office Box 2206
Savanah, Georgia 31402-2206

Re: Gulfstream IV Sales Agreement No. G-6/
Mayacamas Corporation

Dear Dr. Innes:

We have been retained by Mayacamas Corporation in connection with Gulfstream's breach of the above-referenced contract between Gulfstream and Mayacamas, dated June 1, 1983, as amended.

We have reviewed your letter of August, 1985, to Mr. Mosher concerning the above-referenced contract, as well as Mr. Mosher's letter to your Senior Vice President-Marketing (H.M. Stumpf, Jr.), dated August 13, 1985.

We assume that Mr. Stumpf has delivered a copy or communicated the contents of Mr. Mosher's August 13 letter to you, and thus, as you requested in your letter of August 14, you have thereby been advised that Mayacamas considers Gulfstream to be in default and breach of the agreement. Nevertheless, we enclose a further copy of Mr. Mosher's letter of August 13, 1985 which gives notice to Gulfstream of Gulfstream's breach, and makes a demand for a return of the deposit, with accrued interest,

as well as payment of $500,000 in settlement of Mayacamas' damage claims.

Mayacamas has advised us that it has not received any response to its letter of August 13. Please be advised that Mayacamas does not consider your letter of August 14, 1985 to be a response to its August 13 letter, in that your letter avoids the issues discussed in Mr. Mosher's letter, and does not comment upon the demands made therein.

I am sure that even a superficial investigation by you will reveal that the damages to Mayacamas as a result of Gulfstream's breach will greatly exceed the $500,000 demand made by Mayacamas on August 13.

You are hereby notified that the offer of settlement made by Mayacamas in its August 13 letter will expire on September 10, 1985.

Very truly yours,

MOSHER, POOLEY, SULLIVAN & HULTQUIST

/s/ James H.A. Pooley

JHAP:jkv
Enclosure

cc: Mayacamas Corporation

EXHIBIT H

ROBERT J. STUMPF
STEPHEN H. DYE
BRONSON, BRONSON & McKINNON
555 California Street
Mailing Address: P.O. Box 7358
San Francisco, CA 94120
Telephone: (415) 391-4500

Attorneys for Defendant and
Counter-Claimant GULFSTREAM
AEROSPACE CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION, a California corporation,
Plaintiff,
v.
GULFSTREAM AEROSPACE CORPORATION, a Georgia corporation,
Defendant.
/

No. C 85 20658 RPA

ANSWER TO COMPLAINT; COUNTER-CLAIM FOR DAMAGES FOR BREACH OF CONTRACT

GULFSTREAM AEROSPACE CORPORATION, a Georgia corporation,
Counter-Claimant,
v.
MAYACAMAS CORPORATION, a California corporation,
Counter-Defendant.
/

Defendant and Counter-Claimant GULFSTREAM AEROSPACE CORPORATION ("Gulfstream") hereby responds to the Complaint herein as follows:

PARTIES, JURISDICTION AND VENUE

1. Answering paragraph 1, Gulfstream admits the allegations in this paragraph.

2. Answering paragraph 2, Gulfstream admits that Gulfstream principal place of business is and at all times mentioned in the Complaint was in Savannah, Georgia.

Except as otherwise stated above, Gulfstream denies each of the remaining allegations in this paragraph.

3. Answering paragraph 3, Gulfstream admits the allegations in this paragraph.

4. Answering paragraph 4, Gulfstream denies the allegations in this paragraph.

FIRST CAUSE OF ACTION

5. Answering paragraph 5, Gulfstream incorporates by reference its responses to paragraphs 1 through 4 of the Complaint herein.

6. Answering paragraphs 6 and 7, Gulfstream denies the allegations in these paragraphs to the extent that they allege representations by Gulfstream other than as set forth in the Gulfstream IV Sales Agreement No. G-6 (the "Agreement"). Except as otherwise stated above, Gulfstream denies each of the remaining allegations in these paragraphs.

7. Answering paragraph 8, Gulfstream denies the allegations in this paragraph.

8. Answering paragraph 9, Gulfstream admits the allegations in this paragraph.

9. Answering paragraphs 10, 11, 12, 13, and 14, Gulfstream denies the allegations in these paragraphs. Gulfstream further denies that any loss or damage, whether in the amount set forth in the Complaint, or in any other sum, or at all, has been suffered by plaintiff as a result of any act or omission on the part of Gulfstream.

SECOND CAUSE OF ACTION

10. Answering paragraph 15, Gulfstream incorporates by reference its responses to paragraphs 1 through 14 of the Complaint herein.

11. Answering paragraphs 16, 17 and 18, Gulfstream denies the allegations in these paragraphs. Gulfstream further denies that any loss or damage, whether in the amount set forth in the Complaint, or in any other sum, or at all, has been suffered by plaintiff as a result of any act or omission on the part of Gulfstream.

THIRD CAUSE OF ACTION

12. Answering paragraph 19, Gulfstream incorporates by reference its responses to paragraphs 1 through 18 of the Complaint herein.

13. Answering paragraph 20, Gulfstream denies the allegations in this paragraph. Gulfstream further denies that any loss or damage, whether in the amount set forth in the Complaint, or in any other sum, or at all, has been suffered by plaintiff as a result of any act or omission on the part of Gulfstream.

FOURTH CAUSE OF ACTION

14. Answering paragraph 21, Gulstream incorporates by reference its responses to paragraphs 1 through 20 of the Complaint herein.

15. Answering paragraph 22, Gulfstream denies the allegations in this paragraph. Gulfstream further denies that any loss or damage, whether in the amount set forth in the Complaint, or in any other sum, or at all, has been

suffered by plaintiff as a result of any act or omission on the part of Gulfstream.

FIRST AFFIRMATIVE DEFENSE

Gulfstream alleges that the Complaint, and each purported cause of action therein, fail to state a claim for relief against Gulfstream.

SECOND AFFIRMATIVE DEFENSE

Gulfstream alleges that this Court lacks personal jurisdiction over Gulfstream.

THIRD AFFIRMATIVE DEFENSE

Gulfstream alleges that venue in this district is improper.

FOURTH AFFIRMATIVE DEFENSE

Gulfstream alleges that pursuant to Section 13.3 of the Agreement, the Agreement must be construed and interpreted in accordance with the laws of the State of Georgia.

FIFTH AFFIRMATIVE DEFENSE

Gulfstream alleges that plaintiff has materially breached the Agreement.

SIXTH AFFIRMATIVE DEFENSE

Gulfstream alleges that plaintiff, by its actions and inactions with respect to the subject matters herein, is estopped from recovering any relief against Gulfstream.

SEVENTH AFFIRMATIVE DEFENSE

Gulfstream alleges that plaintiff, by its actions and inactions with any respect to the subject matters herein, has waived any and all claims against Gulfstream.

EIGHTH AFFIRMATIVE DEFENSE

Gulfstream alleges that plaintiff was careless and negligent with respect to the subject matters of this action and that such carelessness and negligence proximately caused or contributed to the damages plaintiff claims herein, thereby barring or proportionately reducing any potential recovery.

WHEREFORE, Gulfstream prays that plaintiff take nothing by its Complaint herein and that a judgment for costs, including reasonable attorneys' fees, be awarded to Gulfstream in addition to such other and further relief as the Court may deem appropriate.

COUNTER-CLAIM FOR DAMAGES FOR BREACH OF CONTRACT

Defendant and Counter-Claimant GULFSTREAM AEROSPACE CORPORATION (hereinafter referred to as "GULFSTREAM") alleges by way of counter-claim for breach of contract as follows:

1. On June 1, 1983, MAYACAMAS COPORATION (hereinafter referred to as "MAYACAMAS") entered into a contract with GULFSTREAM for the purchase of a Gulfstream IV aircraft to be delivered following flight testing and inspection to be conducted on or before February, 1987. A copy of said contract is attached hereto and made a part hereof as Exhibit A.

2. Pursuant to the terms of the agreement GULFSTREAM billed MAYACAMAS for $675,000 by invoice dated July 8, 1985, a copy of which is attached hereto as Ex. B.

3. Under the payment schedule in Section 3.2 of the contract that is attached hereto and incorporated by reference herein as Ex. A, MAYACAMAS was obligated to make a payment of 5% of the basic purchase price of the aircraft on or before August of 1985. MAYACAMAS failed to make any such payment on or before August, 1985 and continues to be in default of the contract as of the date of this counter-claim.

4. At all times pertinent herein GULFSTREAM has been fully ready, willing and able to perform its obligations under the contract. MAYACAMAS was given an opportunity to cure the default in its obligations and has failed to do so.

5. MAYACAMAS' repudiation of the agreement and failure to meet the payment schedule contained in Section 3.2 of the contract that is attached hereto and incorporated herein as Ex. A constitutes a material breach of the contract.

6. As a result of MAYACAMAS' breach of the agreement, GULFSTREAM has been damaged in the amount of lost profits (including overhead), together with all incidental expenses, which amount exceeds $500.000.

7. The conduct of MAYACAMAS has been stubbornly litigious, unjustified in law and in fact and has caused GULFSTREAM unnecessary trouble and expense entitling

GULFSTREAM to recover all expenses of litigation including reasonable attorneys fees and costs.

WHEREFORE, GULFSTREAM respectfully prays as follows:

(a) GULFSTREAM be awarded an amount equal to the profit to be made on the aircraft sale as damages for MAYACAMAS' willful breach of the contract as well as incidental, consequential and related damages arising directly from MAYACAMAS' breach of the contract in an amount exceeding $500,000;

(b) That GULFSTREAM be awarded the costs of this action, including reasonable attorneys fees and expenses; and

(c) That GULFSTREAM be given such other and further relief as the court may deem just and equitable in this action.

DATE: December 3, 1985

BRONSON, BRONSON & McKINNON

By: /s/ Stephen H. Dye
ROBERT J. STUMPF
Attorneys for Defendant
and Counter-Claimant
GULFSTREAM AEROSPACE
CORPORATION

EXHIBIT B

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

GULFSTREAM AEROSPACE CORPORATION,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	NO. X85-3244-B
MAYACAMAS CORPORATION,	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION

I

INTRODUCTION

The complaint filed by Gulfstream Aerospace Corporation ("Gulfstream") alleges that Gulfstream and Mayacamas Corporation ("Mayacamas") entered into a contract for the purchase of a Gulfstream IV aircraft, which contract called for delivery of the aircraft on on before February, 1987. It is further alleged that Mayacamas failed to make a payment required under the agreement, that this failure constitutes a breach of the contract, and that Mayacamas is liable to Gulfstream for damages.

Jurisdiction in this court is predicated on Gulfstream's assertion that Mayacamas "transacts business in Chatham County, Georgia" and that the contract entered into between Mayacamas and Gulfstream "was to be performed in Chatham County, Georgia." Complaint at paragraph 3.

This brief will establish:

1) Mayacamas has not transacted business in Georgia as required by Georgia's Long-Arm Statute and the Georgia Courts and this Court thus lacks personal jurisdiction over Mayacamas with respect to the instant action;

2) The relationship between Mayacamas and Gulfstream was solicited by Gulfstream's marketing organization in California from Gulfstream's California offices;

3) Mayacamas has made no visits to Georgia in connection with the transaction;

4) The contract was negotiated and executed by Mayacamas in California and picked up in California by Gulfstream's representative;

5) The only contacts of Mayacamas with Georgia in connection with the transaction were correspondence or telephone calls insufficient to confer jurisdiction; and

6) Mayacamas is the true plaintiff in this dispute, and Mayacamas has filed an action against Gulfstream in the United States District Court, Northern District of California, wherein Gulfstream has filed a counterclaim praying for the same relief as it seeks in this Court.

II

ARGUMENT

The Georgia Long-Arm Statute provides:

> A court of this state may exercise personal jurisdiction over any nonresident . . . as to a cause of action arising from any of the acts, omissions, ownership, use or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

> (1) Transacts any business *within* this state . . . .

O.C.G.A. 9-10-91 (emphasis added)

The act or acts of the nonresident giving rise to the cause of action must have sufficient relationship to the State of Georgia. Jurisdiction over that nonresident will exist only:

> [1] if the nonresident has purposefully done some act or consummated some transaction in this state,
>
> [2] if the cause of action arises from or is connected with such act or transaction, and [3] if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice.
>
> *Davis Metals, Inc. v. Allen,* 230 Ga. 623, 198 S.E.2d 285, 287 (1973).

The cause of action in the instant case does not arise from any act or transaction purposefully done "*within*" Georgia by Mayacamas. As shown by the affidavit of Roger L. Mosher filed in support of this motion, the subject contract was negotiated outside of Georgia and was executed by Mayacamas outside the state. No visits were made to Georgia by any representative of Mayacamas with respect to this contract, either before or after its execution.

The initial contacts between Mayacamas and Gulfstream were in California. Subsequent negotiations were conducted with Gulfstream's representatives in California primarily by telephone calls to or from the California office or California residence of Gulfstream's representative. The only contacts of Mayacamas with Georgia were a few mail and telephone communications, mostly after the con-

tract was executed, which are insufficient to constitute the transaction of business in Georgia.

After negotiating the contract in California with a California-based Gulfstream representative, Mayacamas executed the agreement in California. When a dispute arose under the contract, correspondence was exchanged between Mayacamas in California and Gulfstream in Georgia. These contacts do not confer jurisdiction on the Georgia courts.

In *Fowler Products Company, Inc. v. Coca-Coca Bottling Company of Tulsa, Inc.*, 413 F.Supp. 1339 (M.D. Ga. 1976) the Oklahoma defendant negotiated and executed a sales agreement in Oklahoma, mailed the agreement and a down payment check to Georgia, sent into Georgia the information and specifications for the machinery which was to be manufactured in Georgia, and accepted the specially manufactured goods in Georgia by virtue of a contractual provision providing for delivery to a carrier in Georgia. No agent or employee of defendant had ever been in Georgia in connection with the contract.

The court in *Fowler* dismissed the case for want of jurisdiction, holding that "[i]n these circumstances, the foreign corporation cannot fairly be said to have subjected itself to the jurisdiction of the courts of this state by 'transacting any business' within it." *Id.* at 1341. Noting that "mere contracting with a Georgia resident is insufficient to extend the long arm of the Georgia courts," the court stated:

> The Oklahoma defendant in the instant case has done nothing within this state except technically accept goods under the FOB Athens contract and address

> mail to an Athens address concerning partial payment under the contract. This is not the purposeful conduct of activities within the state required to allow the exercise of long-arm jurisdiction.
>
> *Id.* at 1341-1342.

Like *Fowler*, all contract negotiations took place outside Georgia, and any mailings were insufficient to establish jurisdiction.

The significance of the situs of the negotiations and the insignificance of mail or telephone contacts with Georgia was emphasized in *O.N. Jonas Company, Inc. v. B. & P Sales Corp.*, 232 Ga. 256, 206 S.E.2d 437 (1974). Although agents of the defendant traveled to Georgia to visit the manufacturing plant prior to the placing of mail or telephone orders for the goods, the Court affirmed the finding of no jurisdiction since "no negotiations or contracts [were] entered into in Georgia with respect to the goods that are the subject matter of these actions," and the contacts with the state were insufficient. *Id.*, 206 S.E.2d at 439.

While *Jonas* demonstrates that physical presence in the state is not necessarily sufficient to confer jurisdiction, the *absence* of any physical presence virtually requires a finding that no jurisdiction exists. "Mere telephone or mail contact with an out-of-state defendant . . . is insufficient to establish the purposeful activity with Georgia required by the 'Long Arm' statute." *Wise v. State Board for Examination*, 247 Ga. 206, 209, 274 S.E.2d 544, (1981); *Phillips v. Electrical Constructors of America, Inc.*, 535 F.Supp. 1387 (M.D. Ga. 1982).

In *Graphic Machinery, Inc. v. H.M.S. Direct Mail Service, Inc.*, 158 Ga.App. 599, 281 S.E.2d 343 (1981) the New York defendant telephonically contacted the Georgia plaintiff for information on plaintiff's product, executed an order form and mailed it to Georgia with a partial payment, and telephoned to advise of problems with the shipped goods. The court held that defendant did not transact business in Georgia, finding the factual situation akin to that in *Jonas,* with the exception that no representative of defendant had visited Georgia in connection with the transaction.

III

CONCLUSION

Mayacamas has done no more than make mail and telephone contacts with Georgia in connection with a sales agreement negotiated and executed by Mayacamas in California with Gulfstream representatives based in California. The fact that Gulfstream executed the agreement in Georgia is irrelevant, since "the focus under Georgia law is on what the defendant nonresident has done in Georgia, not on the character of plaintiff's activities." *Fowler,* 413 F.Supp. at 1341.

Since Mayacamas did not transact business in Georgia in connection with the contract this court lacks personal jurisdiction over the defendant and the action should be dismissed.

Mayacamas is the true plaintiff in this dispute. It is apparent that Gulfstream's filing of its complaint in this court is a misguided attempt to gain a tactical advantage over Mayacamas. This effort is particularly in-

appropriate in light of the fact that Gulfstream initiated the relationship in California from its California offices. The action in the United States District Court, Northern District of California, between these same parties provides an appropriate forum for the resolution of this dispute.

Dated: December 13, 1985

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION, a California corporation,

Plaintiff,

vs.

GULFSTREAM AEROSPACE CORPORATION, a Georgia corporation,

Defendant.

/

No. C 85 20658 RPA

Date: January 24, 1986

Time: 9:00 o'clock a.m.

Courtroom: Two

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OR STAY

(Filed January 17, 1986)

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INTRODUCTION

In its opposition brief, MAYACAMAS does not dispute that:

(a) this is a pure diversity case; no federal claim and no peculiarly "federal" interest is involved;

(b) the Agreement in dispute must be interpreted in accordance with Georgia law;

(c) the Georgia action was both filed and served before the present action in federal court;

(d) the Georgia state court can fully and fairly resolve the parties' dispute;

(e) the aircraft in question is to be manufactured in Georgia, and the Agreement further provides for flight testing and inspection, delivery of the aircraft, payment of the purchase price, ground school, flight instruction, warranty work, and 150-hour inspection at Gulfstream's plant in Savannah, Georgia; and

(f) there is a complete identity of parties between the two actions, and the central claim in both cases is the same: breach of a written Agreement which by its terms must be construed in accordance with Georgia law.

Under these circumstances, and particularly as illustrated on near-identical facts in *Microsoftware Computer Systems v. Ontel Corp.*, 686 F.2d 531 (7th Cir. 1982), this Court should exercise its discretion to dismiss or stay the present action in the interest of "[w]ise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation District v. United States*, 424 U.S. 800 at 817 (citations omitted).

In this reply brief, we will briefly respond to the following three arguments by Mayacamas:

First, Mayacamas argues that "exceptional circumstances" are not present and that the reasoning in *Microsoftware Computer Systems, Inc. v. Ontel Corp.*, 686 F.2d 531 (7th Cir. 1982) has been "seriously undermined" by subsequent decisions. Not so. In fact, one of those subsequent decisions makes it clear that where, as here, the question is *not* whether the federal claimant (Mayacamas) shall have access to a federal court but *which* federal court he shall have access to, "considerations of judicial economy become decisive." *Evans Transportation Co. v. Scullin Steel Co.*, 693 F.2d 715, 719 (7th Cir. 1982).

Second, Mayacamas argues that the Georgia courts do not have jurisdiction over Mayacamas. Gulfstream, however, is confident that on January 30, the Georgia court will have no difficulty finding personal jurisdiction over Mayacamas and hence that this action should proceed, with the highest priority, in the Georgia state courts.

Finally, Mayacamas argues that it, not Gulfstream, is the "true plaintiff" and thus that it would be inappropriate to grant Gulfstream's motion. This is not correct, either legally or factually, and the motion should be granted.

We will briefly discuss these points in greater detail below.

DISCUSSION

I

PARTICULARLY IN THE PRESENT CASE, WHERE MAYACAMAS COULD HAVE OBTAINED FEDERAL JURISDICTION BY REMOVING THE GEORGIA STATE COURT ACTION, THIS COURT SHOULD DISMISS OR STAY THE PRESENT ACTION

Mayacamas agrees that this Court has discretion, in a proper case, to stay or dismiss an action filed in this federal court during the pendency of a parallel action raising essentially the same issues in state court. Indeed, the Ninth Circuit has consistently so held both before and after the Supreme Court's decision in *Colorado River*. *See, e.g., Weiner v. Shearson Hamill & Co.*, 521 F.2d 817, 821 (9th Cir. 1975) ["We thus conclude that the district court possesses the power to abate the present action, even though it be one both for declaratory judgment and damages."]; and *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1980)

[the appropriate question is "whether exceptional circumstances exist that indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to the parties, and conflicting results."]. And although there are limits upon this discretion, a district court's determinations will not be disturbed on appeal except upon a showing of an abuse of discretion. *See, e.g., Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 540 (9th Cir. 1985).

In our earlier brief, we showed that "exceptional circumstances", as that phrase is interpreted in the cases, amply justify a dismissal or stay in the present case. We noted, for example, that unlike the situation in *Tovar* and other Ninth Circuit cases where *Colorado River* motions were denied, the present case involves no federal claim and no peculiarly federal interest.[1] On the contrary, it is Georgia law which must control the interpretation of the disputed agreement.

We also noted that the facts in the present case are almost identical to the facts in *Microsoftware*, where the Seventh Circuit held that it was an abuse of discretion for the district court *not* to grant a stay. There, as here, no federal claim was involved; the state court action was filed first; the central dispute arose out of an agreement which

---

[1] In *Tovar*, the party seeking to proceed in federal court (who had also filed a parallel state court action) had included a federal claim under 42 U.S.C. § 1983. In finding that a dismissal of the federal action was not appropriate, the Ninth Circuit noted that the burden in satisfying the *Colorado River* test was "particularly weighty when those seeking a hearing in federal court are asserting . . . their right to relief under 42 U.S.C. § 1983." 609 F.2d at 1293. In the present case, by contrast, no section 1983 claim—nor any federal claim—is present.

was to be interpreted in accordance with the laws of the state court forum; there was no showing that the state court could not fully and fairly resolve the parties' dispute; and there would have been a "grand waste of effort" by allowing both actions to proceed at the same time.

Nor has this analysis been undermined, as Mayacamas suggests, by the subsequent decisions in *Voktas* and *Evans*. In *Voktas, Inc. v. Central Soya Company, Inc.*, 689 F.2d 103 (7th Cir. 103), the Seventh Circuit *reaffirmed* its *Microsoftware* reasoning and simply noted that factual differences compelled a different result in the specific case at issue, particularly since the *state court* had made it clear that it would stay its proceedings until a disposition of the *federal* suit was achieved. Under these unique circumstances, not present in our case, the Court held that the federal magistrate did not abuse his discretion in denying a stay.[2]

In *Evans Transportation Company v. Scullin Steel Co.*, 693 F.2d 715 (7th Cir. 1982), moreover, the Seventh Circuit likewise distinguished *Microsoftware* on its facts, not its legal analysis. In particular, the court noted that in *Microsoftware* the party which, like Mayacamas, was seek-

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[2] The *Voktas* court summarized the *Microsoftware* factors as follows:

> (1) The case raised no peculiarly "federal" interest militating in favor of a federal forum; (2) the state court action was filed first; (3) the New York state court expressed no concern as to whether it could fully or fairly resolve the parties' dispute; and (4) the resources of both both the courts and the parties would be wasted by litigating the same issues regarding the same contract in two forums at once. 689 F.2d at 105, n. 6.

All of these factors are present in our case.

ing to proceed in federal court could have obtained federal jurisdiction, in the first instance, simply by removing the previously-filed state court action. In such circumstances the court said, considerations of judicial economy become "decisive":

> If as in *Microsoftware* the question is not whether the federal claimant shall have access to a federal court but which federal court it shall have access to, considerations of judicial economy become decisive, for there is no question of depriving a litigant of his right to litigate in federal court. 693 F.2d at 719.[3]

So also in the present case. As in *Microsoftware*, Mayacamas could have removed the Georgia state court action on grounds of diversity, which "would have promoted

---

[3] Mayacamas also cites *Green v. Indal, Inc.*, 565 F.Supp. 805 (S.D. Ill. 1983), noting its interpretation of the law in the Seventh Circuit that a stay may be granted in a *Colorado River* situation purely for reasons of judicial economy. That is in fact a correct interpretation not only of the law in the Seventh Circuit, but a proper interpretation of the law under *Colorado River* generally. As the court in *Green* noted:

> After *Evans*, it is apparently the law of this circuit that if staying a federal action would not definitely foreclose the federal claimant of his federal forum, such a stay can be granted purely for reasons of judicial economy, and "exceptional circumstances" need not be shown. Only where granting the stay would definitely commit resolution of the issues to state court must the stay be warranted by "exceptional circumstances." 565 F.Supp. at 809.

In *Green*, the district court nevertheless held that a stay was not appropriate because one of the two claims by the federal claimant was committed to the exclusive jurisdiction of the federal courts. Hence, judicial economy would not have been served by trying one claim in one forum and one claim in the other. 565 F.Supp. at 809-810. As noted above, there are no such complicating circumstances, and no federal claims at all, in the present case.

judicial economy yet at the same time have fully protected [Mayacamas'] interest in litigating the case in a federal court. . . ." 693 F.2d at 719. As was also the case in *Microsoftware*, it is now too late for Mayacamas to remove, but Mayacamas "could blame no one but itself for that." 693 F.2d at 719.

Accordingly, and particularly in light of these more recent Seventh Circuit decisions, this Court should dismiss or stay the present action.

II

THE GEORGIA STATE COURT WILL HAVE NO DIFFICULTY IN FINDING PERSONAL JURISDICTION OVER MAYACAMAS AND HENCE THIS ACTION WILL PROCEED, WITH THE HIGHEST PRIORITY, IN THE GEORGIA STATE COURTS

It is true that Mayacamas has filed a motion to dismiss the Georgia state court action for lack of personal jurisdiction over Mayacamas. That motion is set for hearing in Georgia on January 30, 1986. Obviously, were such motion to be granted, which it will not be, the present federal action would proceed.

But Mayacamas' motion will certainly *not* be granted. As we noted in our earlier brief, the aircraft in question is to be manufactured in Georgia, and the underlying Agreement provides for flight testing and inspection, delivery of the aircraft, payment of the purchase price, ground school, flight instruction, and warranty work, among other things, at Gulfstream's plant in Georgia. These undisputed facts, as well as the "few mail and telephone communications" of Mayacamas with Georgia (Mosher Decl., Ex. "B," p. 3), are certainly sufficient minimum contacts under the Geor-

gia long-arm statute. Accordingly, the Georgia court will have no difficulty in finding personal jurisdiction over Mayacamas and will allow this action to proceed, with the highest priority on the court's trial calendar in Georgia.

What this means, as a practical matter, is that the Georgia action will be ready for trial in Georgia within a very short period of time, likely as early as March or April of this year. Given this timing and priority status in Georgia, it is virtually certain that the Georgia case will go to trial long before the California action. The end result of allowing both actions to proceed simultaneously would simply be, in the words of *Microsoftware*, a "grand waste of time" for the parties and this Court.

In the event, however, that this Court wishes to take the pending jurisdictional motion in Georgia into account, we suggest that the Court simply stay—not dismiss—this action. If Mayacamas then somehow prevails on its jurisdictional motion in Georgia, the stay could be lifted. That, however, will not happen.[4]

III

MAYACAMAS IS NOT THE "TRUE PLAINTIFF," AND ITS REACTIVE "CLAIM" AROSE ONLY WHEN IT REPUDIATED ITS CONTRACTUAL OBLIGATIONS TO GULFSTREAM

Mayacamas' last argument is that it, not Gulfstream, is the "true plaintiff." That language does not appear in

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[4] In order to avoid this uncertainty caused by having the present hearing take place prior to determination of the jurisdictional issue in Georgia on January 30, Gulfstream suggested to Mayacamas that the hearing on the present motion be continued until after that date. Mayacamas would not agree.

any of the cases, nor is it clear what Mayacamas means. What is clear, on the other hand, is that Mayacamas' "claim" arose only when it repudiated its contractual obligations to Gulfstream to purchase the aircraft in question, despite the fact that this claim finds absolutely no support in the language of the Agreement.[5]

What is also clear is that Mayacamas' claim is "reactive," that is, filed as a direct strategic response to Gulfstream's Georgia state court action. Ironically, on page 9 of its brief, Mayacamas quotes language from *Moses H. Cone* that a stay may be used "to deter vexatious use of the federal courts." Later in the same footnote, however, the Court finds considerable merit in the proposition that district courts may properly consider the "vexatious or *reactive* nature of either the federal or state litigation" in ruling upon a *Colorado River* motion. 460 U.S. at 18, n. 20 (emphasis added). That is precisely the situation in the present case.

CONCLUSION

The dispute between the parties, arising out of an agreement which must be interpreted under Georgia law,

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[5] Although the Court obviously need not address the merits of the parties' dispute on this motion, it is interesting to note that section 13.2 of the Agreement provides that:

> The terms and conditions contained herein constitute the entire Agreement between the parties hereto with respect to the purchase and sale of the Aircraft and shall supersede all communications, representations or agreements, either oral or written, between the parties hereto with respect to the subject matter hereof, and no agreement or understanding bearing the terms and conditions hereof shall be binding upon either party hereto unless in writing attached hereto and signed by duly authorized representatives of both parties. (Ramee Affid., Ex. "A")

Mayacamas' theory thus runs directly counter not only to the facts, but this specific contract language.

should properly be determined in the Georgia state court, where the action was first filed and served and where the case will proceed to trial with the highest priority. Here, as in *Microsoftware,* exceptional circumstances amply justify a *Colorado River* dismissal or stay in the interests of fairness and wise judicial administration.

Beyond that, and as was also the case in *Microsoftware,* the question in the present case is not whether Mayacamas could have had access to a federal court, but rather *which* federal court it could have had access to; and hence considerations of judicial economy become decisive.

For all these reasons Gulfstream respectfully submits that this Court should exercise its discretion to dismiss or stay the present action.

DATED: January 16, 1986.

BRONSON, BRONSON & McKINNON

/s/ By: ROBERT J. STUMPF
Attorneys for Defendant
GULFSTREAM AEROSPACE
CORPORATION

REPLY BRIEF IN SUPP MTN TO DISMISS OR STAY

CALENDARED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAYACAMAS CORPORATION, Plaintiff, vs. GULFSTREAM AEROSPACE CORPORATION, Defendant.	)	NO. C 85-20658 RPA ORDER DENYING MOTION TO DISMISS OR STAY (Filed February 21, 1986)

The Court, having considered the memoranda addressing defendant's motion for a stay or dismissal pursuant to the doctrine of abstention, and having heard the argument of counsel, orders as follows.

Pursuant to the doctrine of abstention on the basis of "wise judicial economy" as set forth in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976), and *Moses H. Cone Hospital v. Mercury Constr. Corp.,* 460 U.S. 1 (1983), this Court must exercise its jurisdiction.

The moving party has the burden of overcoming the strong presumption in favor of the exercise of federal jurisdiction in a case properly before a federal court. Despite the logic of the defendant's concern that this federal diversity case may be duplicative of the state court litigation filed 23 days earlier, the facts of this case fall short of those necessary to justify abstention.

The Court DENIES defendant's motion for a stay or dismissal of this case.

IT IS SO ORDERED

DATED: January 24, 1986

/s/ ROBERT P. AGUILAR
United States District Judge

United States Court of Appeals
For the Ninth Circuit

806 F.2d 928
No. 86-1830
DC #C-85-20658-RPA

MAYACAMAS CORPORATION,
a California corporation,

Plaintiff/Appellee,

vs.

GULFSTREAM AEROSPACE CORPORATION,
a Georgia corporation,

Defendant/Appellant.

OPINION

[Filed Dec. 19, 1986]

Appeal from the United States District Court
for the Northern District of California
District Judge Robert P. Aguilar, Presiding

[Argued and Submitted November 13, 1986—Berkeley]

Decided 12/19/86; Corrected January 16, 1987

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges. WRIGHT, Circuit Judge.

Gulfstream appeals the denial of its motion to stay or dismiss the action pending the resolution of parallel state proceedings. We find these orders nonappealable and dismiss.

FACTS

Mayacamas, a California corporation, agreed to purchase an aircraft manufactured by Gulfstream, a Georgia corporation. Mayacamas later refused to make payments allegedly because Gulfstream increased the production and availability of its aircrafts. This allegedly frustrated

Mayacamas's purpose, which according to Mayacamas was to transfer its rights when demand for the aircraft was high.

Gulfstream filed a breach of contract action against Mayacamas in a Georgia state court. About a month later, Mayacamas filed a diversity action against Gulfstream for breach of the same contract in the district court for the Northern District of California.

Each party has been inconvenienced prosecuting or defending the actions in the two fora. Witnesses and documents are located in both California and Georgia. There has been discovery in both actions.

Gulfstream moved to stay or dismiss the federal action pursuant to the abstention doctrine. *Colorado River Water District v. United States*, 424 U.S. 800 (1976).[1] The district court found no exceptional circumstances that justified abstention, even though the actions may be duplicative.

Gulfstream appeals, asserting jurisdiction under 28 U.S.C. § 1292(a)(1) and 28 U.S.C. § 1291. Alternatively, it requests its petition for appeal be treated as a petition for mandamus.

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[1]Factors considered under the *Colorado River* test include: (1) whether either court has exercised in rem jurisdiction; (2) the convenience of the federal forum; (3) avoidance of piecemeal litigation; (4) order of jurisdiction; (5) whether federal law provides the rule of decision; and (6) whether the state law proceeding is adequate to protect litigants' rights. *Colorado River Water District v. United States*, 424 U.S. at 818-19; *Moses H. Cone Hospital v. Mercury Const. Corp.*, 460 U.S., 23-27 (1983).

ANALYSIS

1. 28 U.S.C. § 1292(a)(1).

Neither this nor the Supreme Court has ruled on whether an order denying a stay of proceeding pending the resolution of a parallel state proceeding is appealable under 28 U.S.C. § 1292(a)(1).

We have jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ." 28 U.S.C. §§ 1292(a)(1).

Certain orders granting or denying a stay of litigation pending the outcome of a proceeding in another forum are analogous to injunctions and appealable under section 1292(a)(1). *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942).

But two criteria must be met. First, the action in which the order was made must be one that, before the fusion of law and equity, was an action at law. Second, the stay must be sought to permit the prior determination of some equitable defense or counterclaim. *Alascom, Inc. v. ITT North Elec. Co.*, 727 F.2d 1419, 1421 (9th Cir. 1984).

Here, the first prong is satisfied because the action is one at law: breach of contract with plaintiff seeking money damages. *See id.; Wren v. Sletten Constr. Co.*, 654 F.2d 529, 533 (9th Cir. 1981).

But the second prong is not satisfied. The stay was not sought to permit determination of an equitable de-

fense. Avoiding duplicative litigation is an equitable consideration, not an equitable defense. *See Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1073 (3d Cir. 1983).

We decline to follow the Seventh Circuit, which ruled that a stay requested to prevent wasteful duplication of lawsuits is an equitable defense. *Microsoftware Computer Systems v. Ontel*, 686 F.2d 531 (7th Cir. 1982). Instead, we shall follow circuits that find these orders nonappealable under 1292(a)(1). *See Gold v. Johns-Manville Sales Corp.*, 723 F.2d at 1073 (equitable considerations do not constitute equitable defense); *Jackson Brewing Company v. Clarke*, 303 F.2d 844, 846 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962) (stay to permit pending state action between the parties not considered an equitable defense); *Andrews v. Southern Discount Co. of Georgia*, 662 F.2d 722, 724 (11th Cir. 1981) (stay to permit resolution of disputed issues in state court not appealable).

2. 28 U.S.C. § 1291

The denial of a stay is not a final decision appealable under section 1291 because it does not end the litigation on the merits. *In re Benny*, 791 F.2d 712, 718 (9th Cir. 1986); *see Carlin v. United States*, 324 U.S. 229, 233 (1945). But Gulfstream argues that it is appealable under an exception to the final judgment rule: the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547 (1949).

This exception allows appeals from interlocutory orders that (1) conclusively determine a disputed question, (2) resolve an important issue separate from the merits, and (3) are effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *United States v. Ohnick*, 803 F.2d 1485 (9th Cir. 1986).

The collateral order exception applies only where there is an "asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). Before the *Cohen* test will apply, the appellant must show that the district court's erroneous decision will deprive him of some protected interest. *In re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1023-24 (9th Cir. 1981); *see Abney v. United States*, 431 U.S. 651, 659-60 (1977) (claimed violation of double jeopardy); *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2817 (1985) (claim of qualified immunity); *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984) (right of federal judge not to be indicted unless first impeached).

Here, Gulfstream has no right to have this federal action stayed or dismissed. It is not deprived of a protected interest[2] thus, we do not reach the *Cohen* test, and we find the order nonappealable.[3]

---

[2]Gulfstream's reliance on *Commuter Transp. Systems, Inc. v. Hillbrough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), is inapposite. There, a denial of summary judgment on grounds of immunity was held appealable as a collateral order. But a claim of immunity is a protected interest that conclusively determines the defendant's right not to stand trial. *See Mitchell v. Forsyth*, 105 S. Ct. at 2816 (1985).

[3]Even if the order did involve a protected interest, it would not be appealable under *Cohen*. The denial of a stay does not conclusively determine the issue. The district court may reopen the order and consider a stay if the *Colorado River* factors begin to weigh in favor of abstention.

3. Writ of Mandamus

Gulfstream requests that its notice of appeal be treated as a petition for a writ of mandamus under 28 U.S.C. § 1651. We decline to do so.

No serious hardship or prejudice will result from the order denying a stay or dismissal. *See Hartland v. Alaska Airlines*, 544 F.2d 992, 1004 (9th Cir. 1976) (Wallace, J., concurring). Even if we were to grant review, Gulfstream can not show a clear and undisputed right to the writ. *See Bankers Life Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953); *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977) (providing five guidelines for mandamus analysis). It was well within the district court's discretion to deny the motion. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978).

APPEAL DISMISSED.

Filed December 19, 1986

Mayacamas Corporation

v.

Gulfstream Aerospace Corporation

No. 86-1830

Cathy A. Catterson, Clerk,
U.S. Court of Appeals

SNEED, Circuit Judge, Dissenting:

I respectfully dissent from the holding that this order is not appealable. Although the issue is a significant one,

I shall not extend this expression of my views beyond stating that I would follow the Seventh Circuit's holding appearing in *Microsoftware Computer Systems v. Ontel Corporation*, 686 F.2d 531 (7th Cir. 1982). That is, in my view the order is appealable under 28 U.S.C. § 1292 (a)(1).

It will serve little purpose for me to discuss the merits of the appeal. Suffice it to say, I would affirm the district court's refusal to abstain.

PETITIONER'S

BRIEF

No. 86-1329

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

GULFSTREAM AEROSPACE CORPORATION,
A Georgia corporation,
Petitioner,

VS.

MAYACAMAS CORPORATION,
a California corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. *Appellate Jurisdiction*

(a) Whether the district court's decision to allow respondent's diversity lawsuit to proceed, despite its failure to remove an identical state-court lawsuit between the same parties, constituted an appealable "collateral order" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

(b) Alternatively, whether the district court's decision was appealable under 28 U.S.C. § 1292(a)(1), as an order "refusing ... [an] injunction[n] ...," or otherwise should have been reviewed under the mandamus jurisdiction.

(c) However invoked, whether an effective exercise of appellate jurisdiction required a temporary stay of the district court proceedings pending the outcome.

2. *The Removal Issue*

Whether the availability of removal, which avoids the undesirable frictions and duplications of concurrent state and federal lawsuits, created an "exceptional circumstance" under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), calling for at least a stay of this duplicative federal diversity suit filed by a state-court defendant which failed to exercise its right of removal.[1]

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[1] The only parties to the proceedings in the Ninth Circuit were those stated on the caption of this brief. A listing of affiliated corporations pursuant to Rule 28.1 appears on petitioner's supplemental appendix to the petition for certiorari.

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No. 86-1329

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Respondent.

PETITIONER'S BRIEF ON THE MERITS

OPINION BELOW

The opinion below is reported as *Mayacamas Corp. v. Gulfstream Aerospace Corp.*, 806 F.2d 928 (9th Cir. 1986).

SUPREME COURT JURISDICTION

The opinion of the Court of Appeals (J.A. 149-155) was filed on December 19, 1986, and corrected in a minor respect on January 16, 1987. No petition for rehearing was filed. The petition for certiorari was filed on February 12, 1987. Jurisdiction for this matter is conferred by 28 U.S.C. § 1254 (a).

STATUTES INVOLVED

(1) *28 U.S.C. § 1441(a) and (b)*

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the

district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the Uniited States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(2) *28 U.S.C. § 1404 (a)*

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

Petitioner, Gulfstream Aerospace Corporation ("Gulfstream"), contracted in 1983 (J.A. 32) to build an aircraft for the respondent, Mayacamas Corporation ("Mayacamas"). Gulfstream's plant is in Georgia, delivery was to be in Georgia (J.A. 34), and the parties agreed to let Georgia law govern any disputes. (J.A. 54) Gulfstream is a Georgia corporation, and Mayacamas a California corporation. (J.A. 7)

In August 1985, Mayacamas refused to make a $673,500 progress payment stipulated by the contract, and demanded its deposit back, claiming that Gulfstream had frustrated Mayacamas' alleged purpose in the transaction. (J.A. 109) Gulfstream thereupon filed a one-count breach of contract action against Mayacamas on October 9, 1985, in the Superior Court of Chatham County, Georgia. (J.A. 2-5)

It was undisputed below that Mayacamas and Gulfstream have diverse citizenship; that original federal subject matter jurisdiction would have been available as to the Georgia action under 28 U.S.C. § 1332; and that Mayacamas, the sole defendant in Gulfstream's action, would have had the right to remove it

pursuant to 28 U.S.C. § 1441(b) because "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Mayacamas, however, never attempted to remove Gulfstream's action. The thirty-day deadline of 28 U.S.C. § 1446(b) expired no later than December 1, 1985. (J.A. 75)

Instead, on November 1, 1985, Mayacamas filed an action against Gulfstream, and no other parties, in the United States District Court for the Northern District of California. (J.A. 7-13) Although it pleaded four causes of action, Mayacamas simply asserted four different state-law theories of liability in connection with precisely the same contract, and the same dispute, involved in Gulfstream's prior action in Georgia.

Indeed, on December 13, 1985, Mayacamas filed a four-count counterclaim in the Georgia state action. (J.A. 80-85) This pleading curiously resembled Mayacamas' four-count diversity complaint in the Northern District of California. (Compare J.A. 7-13) It was manifestly a compulsory counterclaim.

Gulfstream promptly moved on November 29, 1985, for a stay or dismissal of the federal action under the *Colorado River* doctrine. (J.A. 14-27) After briefing and oral argument, the district court denied any relief by order filed on February 21, 1986. (J.A. 147-8) It concluded that "[T]his Court must exercise its jurisdiction . . . , [even though] this federal diversity case may be duplicative of the state court litigation. . . . " (J.A. 147)

Gulfstream filed a notice of appeal on March 20, 1986. On March 24, 1986, it filed a motion for expedited briefing and a stay of the district court proceedings pending the outcome. Noting a split among the Circuits as to the appealability of the district court's order, Gulfstream requested the Ninth Circuit, if it rejected appealability, to entertain and resolve the *Colorado River* question by treating the notice of appeal as a petition for a writ of mandamus. The request for a temporary stay was sought on alternative bases, too, under Federal Rules of Civil Procedure, Rule 62(g), or 28 U.S.C. § 1651.

The Ninth Circuit did not respond until June 24, 1986. It agreed then to expedite the appeal, but denied Gulfstream's request for a stay in the interim. The oral argument was conducted on November 13, 1986.

On December 19, 1986, the Ninth Circuit issued its opinion dismissing the appeal. First, the court found the order nonappealable under either the *Enelow/Ettelson* or *Cohen* rationale. Then it declined to exercise its mandamus authority, and here reached the merits of the *Colorado River* issue. It found no abuse of discretion, no clear right to the writ, and "no serious hardship or prejudice" from this duplicative litigation. Although a dissenter found the order appealable under *Enelow/Ettelson*, citing the Seventh Circuit's holding in that regard, he concurred with the majority's view on the merits, that "It was well within the district court's discretion to deny the motion." (J.A. 154)

Thus, both the majority and the dissenter completely rejected Gulfstream's principal contention on the appeal, that a *Colorado River* stay was compelled in order to effectuate the Congressional intent in the removal statutes. Indeed, that contention was not even mentioned, though its rejection was plain in the opinions' treatment of this case as a matter of ordinary discretion on an ordinary stay request.

SUMMARY OF ARGUMENT

1. Appellate Jurisdiction

This brief will first demonstrate that the order of the district court, allowing this duplicative action to proceed in lieu of a single removed action, was appealable under 28 U.S.C. § 1291 as a final "collateral order." Under this Court's many decisions since *Cohen v. Beneficial Industrial Loan Corp., supra*, 337 U.S. 541, the ruling below was appealable because it (1) raised federal policy concerns that were too important not to be addressed when they arose; (2) was wholly separate from the merits of the underlying dispute; (3) conclusively determined Gulfstream's right not to litigate this dispute in a duplicative federal forum; and (4) was

effectively unreviewable—and certainly unremediable—on an appeal from a future judgment on the merits.[2]

Secondly, but only in the alternative, this brief will demonstrate that the district court's order was also appealable under 28 U.S.C. § 1292(a)(1). The district court refused to exercise its equitable power to stay a prior pending action at law. Under the "*Enelow/Ettelson*" doctrine, *see, Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935), and *Ettelson v. Metropolitan Life Ins. Co.*, 317 188 (1942), the district court's order was the "equivalent of an order refusing to grant an injunction, and therefore [was] immediately appealable under 28 U.S.C. § 1292(a)(1)." *Microsoftware Computer Systems, Inc., v. Ontel Corp.*, 686 F.2d 531, 534 (7th Cir. 1982).

Finally, assuming *arguendo* there was no appellate jurisdiction under the foregoing doctrines, the undisputed record called for an exercise of the mandamus authority to enforce the plain dictates of the removal statutes and federal policy. *See, Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). Given the total lack of justification for Mayacamas' duplicative diversity suit in lieu of removal, the district court's failure to stay or dismiss this action was a demonstrable abuse of discretion.

2. The Removal Issue

A major concern at the Constitutional Convention, continuing unabated when the First Congress tackled the proposed Judiciary Act, was a fear of undue interference by the proposed federal district courts with the existing state courts. Against that background, the First Congress designed the federal removal process in such a way as to minimize tensions between the two court systems. Removal produced a single and local federal adjudication of a dispute, and did so promptly or not at all.

This fundamental purpose reflected in the Framers' design of the removal process would be frustrated if state-court defendants

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[2] As discussion of the *Cohen* "effectiveness" criterion equally applies to the question whether the Court of Appeals should have stayed the district court proceedings, this brief will not address the latter issue separately. See *post*, p. 15.

could freely bring independent and duplicative federal diversity suits in lieu of invoking the removal jurisdiction. Therefore, just as the McCarran Act's much less fundamental concerns gave rise to an "exceptional circumstance" warranting the dismissal of the federal suit in *Colorado River* itself, here the historic purpose of the removal statutes made an *a fortiori* demand for at least a stay, if not a dismissal, of the instant federal lawsuit.

ARGUMENT

I

APPELLATE JURISDICTION LIES

A. The District Court's Order was a "Final Decision," 28 U.S.C. § 1291, on an Important and Collateral Issue, not Effectively Reviewable by Appeal from a Final Judgment

The Ninth Circuit concluded it had no jurisdiction to review the district court's order allowing the instant lawsuit to proceed. As for the *Cohen* "collateral order" doctrine, the Court of Appeals reasoned that it only applied where there was "a protected interest" (J.A. 153), and found that here there was none. In a footnote (*id.*, fn.3), it also opined that the order was not a "conclusive" ruling as required for *Cohen* appealability.

This Court has examined the "collateral order" doctrine a number of times in recent years. The doctrine has been applied or rejected in those decisions only by an individualized analysis of a specific type of ruling. There is no "protected interest" formula dictating the outcome. Even rights of Constitutional dimension must sometimes await final judgment for appellate review, *e.g.*, *United States v. MacDonald*, 435 U.S. 850 (1978) (Sixth Amendment right to a speedy trial), though not always. *E.g.*, *Richardson v. United States*, 468 U.S. 317 (1984) (Fifth Amendment double jeopardy bar). The appealability of a particular ruling under the "collateral order" doctrine depends, instead, upon several well established criteria.

(1) Review Was Necessary To Effectuate An Important Federal Policy

The importance of an issue is certainly one of the established criteria for *Cohen* appealability. In the Court's most recent discussion of this matter, in *Stringfellow v. Concerned Neighbors*, 480 U.S. ____, 94 L.Ed.2d 389, 108 S.Ct. ____ (1987), it was stated that:

> This ["collateral order"] doctrine recognized that a limited class of prejudgment orders is *sufficiently important* and sufficiently separate from the underlying dispute that immediate appeal should be available. (94 L.Ed.2d at 398) (emphasis added)

Cohen itself had stated that some interlocutory issues are "too important to be denied review," 337 U.S. at 546, and in the oft-repeated language of *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the order must involve "an important issue" to be appealable. *Id.* at 468.

Importance, of course, is more than "the court of appeals or this Court think[ing] the appellant should prevail." *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 35 (1983) (Rehnquist, J., dissenting). Nor is it a matter of indentifying "protected interests" by a gradation of social values. Rather, this Court's decisions show that importance for *Cohen* purposes requires that an important federal policy have a significant practical bearing on an interlocutory issue, as distinct from the ordinary disadvantages to a litigant from an adverse ruling. As will be shown, this kind of importance not only justifies *Cohen* appealability when the other criteria are present; it also provides a sensible limiting principle for this exception to the final judgment rule.

In *Moses Cone Hospital*, the issue was whether a federal suit to compel arbitration, brought under Section 4 of the Arbitration Act, 9 U.S.C. § 4, had been properly stayed in deference to a prior pending state-court suit. The Fourth Circuit reversed the stay, accepting appellate jurisdiction because the federal plaintiff had been placed "effectively out of court," 460 U.S. at 10 (quoting from *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715

(1962)). The stay was designed to allow the concurrent state-court suit to proceed ahead to judgment and *res judicata*.

On certiorari, the *Moses Cone Hospital* Court affirmed both the jurisdictional and merits holdings of the Fourth Circuit. As for jurisdiction, the Court first noted its agreement that the stay order was effectively a final dispostion of the case. 460 U.S. at 9-10. However, the Court next cited the *Cohen* doctrine as an alternative basis for appellate jurisdiction. *Id.* at 11-13. The majority, viewing the stay order as a frustration of "Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," 460 U.S. at 22, found it undisputable that the stay order presented "an important issue. . . . " *Id.* at 12.

While a dissenting opinion by then Associate Justice Rehnquist disagreed, *inter alia*, that the case was important enough for *Cohen* appealability, the disagreement about importance did not appear to be a fundamental one. Chief Justice Rehnquist's opinion, having previously noted that the stay order might actually have produced a faster arbitration, through the state-court proceedings, 460 U.S. at 34 (fn.), addressed the question of *Cohen* importance as follows:

> The issue here was whether the factual question whether there was an agreement to arbitrate should be adjudicated in a state or federal court. . . . I do not see how this issue is more important than any other interlocutory order that may place a litigant at a procedural disadvantage. (460 U.S. 35)

Thus, the dissent did not reject the majority's major premise, that a federal policy bearing on a particular kind of interlocutory ruling can make it an important one for *Cohen* appealability purposes. *See, e.g., Richardson v. United States, supra*, 468 U.S. 317 (the denial of a double jeopardy claim had important "implications for the administration of criminal justice," 468 U.S. at 320). Rather, the dissenting opinion rejected the majority's *minor* premise, that the Congressional arbitration policy was in fact frustrated or even implicated by the stay ruling, because the state court may have provided an equally sure and perhaps faster means to the end desired by Congress.

Unlike *Moses Cone Hospital*, where there was disagreement over the practical necessity of *Cohen* appealability in order to effectuate the federal arbitration policy, there can be no doubt about the practical requirements of the federal policy involved in the instant case. Pointing the way are two decisions, only recently cited with approval in *Mitchell v. Forsyth*, 472 U.S. ____, 86 L.Ed.2d 411, 424 (fn.8), 52 U.S.L.W. 4798 (1985) which demonstrate that when an important federal policy demands a particular forum for a dispute, the frustration of that policy can justify *Cohen* appealability. In two opinions authored by Justice White, handed down on the same day, the Court's decisions in *Local No. 438 v. Curry*, 371 U.S. 542 (1963), and *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555 (1963), strongly support *Cohen* appealability in the instant case. They further demonstrate how the importance of such appealability would also provide a clear limiting principle for it.

The *Curry* case, like the instant one, involved a question of forum selection; it could easily have been dismissed as a common procedural dispute. Also, just as here, the question arose at the very threshold of the litigation: the Georgia courts had simply decided to proceed with a lawsuit, rejecting the contention that the dispute belonged instead before the National Labor Relations Board. Although a temporary injunction had been ordered as well, the dispositive question was whether the dispute was properly before the Georgia courts. An affirmative ruling on that question, as here, was as interlocutory as a ruling can be.

So the threshold question in *Curry* was whether this Court was presented with a "final judgment" of a state court. 28 U.S.C § 1257. That requirement is analogous to the "final decision" requirement of 28 U.S.C. § 1291, as the Court recently stated in *Mitchell v. Forsyth, supra*, 86 L.Ed.2d at 424, fn.8:

> Similarly, we have held that state court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are "final" for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257.

The analogy had also been adopted in the cited companion decisions under § 1257, because *Curry*, the lead case on the

appealability issue, relies primarily on the *Cohen* doctrine under § 1291.

Curry's analysis of *Cohen* appealability concluded with this statement:

> [P]ostponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts. (371 U.S. at 550)

Appealability was required to effectuate an important federal policy: that certain labor disputes should be adjudicated in a specialized federal administrative forum. The interlocutory order in *Curry* was more, therefore, than "a state court's determination as to state versus federal jurisdiction . . . ," as Justice Harlan stated in a concurring opinion. 371 U.S. 553. Indeed, the concurring opinion criticized the majority for attaching appealability to a jurisdictional determination "without more." *Id.* But there *was* more: an important federal labor policy.

Curry is manifestly not a holding that all affirmations of a court's subject matter jurisdiction, or determinations to exercise it, are immediately appealable. For the same reasons, and in like manner, a holding of *Cohen* appealability in the instant case would hardly apply to all denials of stay motions. It has recently been said that, "Most claims entitled to immediate appeal have a self-limiting quality." *Mitchell v. Forsyth, supra*, 85 L.Ed.2d at 444 (Brennan, J. dissenting). Whether a qualified immunity claim has that self-limiting quality or not, it is clear that the claim in *Curry* did, and that the claim in the instant case does, as well. It only arises when a diversity suit is filed in lieu of a diversity removal.

In the companion case following *Curry*, *Mercantile Nat. Bank v. Langdeau, supra*, 371 U.S. 555, the Texas Supreme Court held that two national banks had properly been sued in a county permitted by a state venue statute, although it was not the banks' "home county," 371 U.S. 560, as required by 12 U.S.C. § 94. As in *Curry*, this holding was unarguably interlocutory; all it meant was that an action would proceed where it had been filed. Nevertheless, finding the appellate jurisdiction issue to be "quite

similar" 371 U.S. 557, to the one raised in *Curry*, the Court found only a brief discussion necessary in *Langdeau* in order to reach the same conclusion.

Langdeau, like *Curry*, was read by Justice Harlan as a holding that all decisions rejecting a venue challenge are immediately appealable. The *Langdeau* dissent saw the rulings below as "nothing more than a determination that venue was properly laid in the county where suit against these appellants was brought." 371 U.S. at 572. Pressing that analysis further, Justice Harlan wrote that the "appellants fall back on the familiar assertion that they should not be subject to a burdensome trial in the wrong forum . . . " *Id.* at 574.

The majority opinion in *Langdeau* did not expand on this issue. But its reliance on *Curry* provides an appropriate response to the dissenter's critique. If the holding was, in fact, as broad as Justice Harlan saw it to be, his critique was certainly well taken. *All* venue challengers could take a *Cohen* appeal if they were unsuccessful. However, the *Langdeau* holding only applied to a particular kind of venue challenge, one that rested on an important federal policy. *See* 371 U.S. 558-562. That policy at once justified and limited the Court's holding on *Cohen* appealability.

The question for the instant case, therefore, is whether there was likewise an important federal policy calling for *Cohen* appealability of the district court's order. The test is whether Gulfstream simply sustained an ordinary litigation set-back, with effects substantially indistinguishable from those that many other litigants might suffer from the denial of a stay motion—or whether the decision to proceed with this particular type of lawsuit also implicated an important federal policy, and had significant adverse effects *on the policy itself*, not just on the fortunes of the litigants.

As this brief will fully demonstrate in its discussion of the removal statutes (*post*, pp. 23-30), they have a direct, important, and time-significant bearing on this type of interlocutory ruling. This amply meets the importance criterion for *Cohen* appealability. As in *Curry* and *Langdeau*, if not more so, the very continua-

tion of the instant litigation frustrated the crux of a significant federal policy.

No holding is being sought that all denials of a motion for a stay or dismissal under *Colorado River* are immediately appealable. As to such a holding, the criticisms of Justice Harlan in *Curry* and *Langdeau*, Chief Justice Rehnquist in *Moses Cone Hospital*, and Justice Brennan in *Mitchell v. Forsyth* would be apt and well taken. However, just as the forum challenges in *Langdeau* and *Curry* were distinctive for their invocation of a special federal policy, so the forum challenge here invokes a special and historic federal strategy for maintaining the proper "interrelationship of the state and federal courts." *Brillhart v. Excess Ins. Co. America*, 316 U.S. 491, 494 (1940). There was a special federal concern when the district court insisted on proceeding with the instant lawsuit.

(2) The Forum Issue Was Completely Separate From The Merits

As indicated at the outset, importance only begins the necessary inquiry for *Cohen* appealability. In the Court's most recent formulation of this doctrine, the interlocutory ruling must also be "separate from the underlying dispute. . . . " *Stringfellow v. Concerned Neighbors, supra*, 94 L.Ed.2d 389, 398.

To be sure, some issues concerning the proper forum for a dispute may not be sufficiently separate from the merits to warrant an interlocutory appeal. For example, *forum non conveniens* rulings sometimes require analysis of the pleadings, parties, discovery, trial witnesses, applicable substantive law, and available remedies. Such a ruling would hardly require a *Cohen* appeal just because the parties had been forced to litigate in the wrong forum, however disfavored it may be. (An appeal by permission under 28 U.S.C. § 1292(b) provides the most suitable remedy.) Separateness from the merits is an appropriate and well established requirement in this area. *See, e.g., Coopers & Lybrand v. Livesay, supra*, 437 U.S. 463 (class determinations are typically "enmeshed in the factual and legal issues comprising the plaintiff's cause of action"); *Richardson-Merrel, Inc. v. Koller*, 472 U.S. ____, 86 L.Ed.2d 340, 352, 105 S.Ct. ____ (1985) (disqualifications of counsel must typically be reviewed in the context of the likely pretrial or trial proceedings).

In the instant case, however, there was no need to delve into the merits of the underlying dispute. Removal was available to Mayacamas without question; the federal lawsuit was, on its face, a compulsory counterclaim in the state-court litigation; and even the *Colorado River* prudential factors were covered by short affidavits on issues collateral to the merits. Thus, the Seventh Circuit properly found that this kind of ruling was separate from the merits for *Cohen* purposes, *Microsoftware Computer Systems, Inc. v. Ontel Corp., supra*, 686 F.2d 531, 534, although it found the "conclusiveness" criterion lacking.

Moreover, this Court held in *Moses Cone Hospital* that a "refusal to adjudicate the merits plainly presents an . . . issue separate from the merits." 460 U.S. at 12. There was no dissent from this finding of separateness, and it applies with equal logic to an opposite ruling on the same issue. Refusing *or* agreeing to proceed with a particular lawsuit is a decision separate from the merits of the dispute. The analysis of the underlying lawsuits in *Moses Cone Hospital* did not require the reviewing court to become "enmeshed in the factual and legal issues." Nor here.

In sum, the Court's recent statement in *Stringfellow* fully applies to the instant case. The ruling below was "sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available." 94 L.Ed.2d at 398.

(3) The Ruling Conclusively Determined That The Duplicative Federal Litigation Was Permissible

The principal disagreement within the Court in *Moses Cone Hospital* involved the next *Cohen* requirement: an order that "conclusively determine[s] the disputed question." *Coopers & Lybrand, supra*, 437 U.S. at 468. Manifestly, appeals should not be allowed from orders that are either "inherently tentative," *Coopers*, or are not even "made with the expectation that they will be the final word on the subject addressed." *Moses Cone Hospital*, 460 U.S. 12, fn. 14 (opinion of the Court).

Analysis of the dissenting opinion in *Moses Cone Hosptial*, however, reveals that its concerns about the conclusiveness of the stay order in that case do not apply to the order below, failing to stay a diversity suit in light of the availability of a diversity removal forum. Unlike the issue of separateness from the merits, the decision to proceed with Mayacamas' diversity suit requires a distinct *Cohen* analysis for "conclusiveness."

The order in *Moses Cone Hospital* stayed the federal proceedings "pending resolution of the state-court suit. . . . " 460 U.S. 7. The majority found that order "conclusive" because, unlike the *Coopers* class decertification order that was "inherently tentative," the district court's stay order was intended as the final ruling on the question presented.

The dissenting opinion argued, however, that the order was in reality "subject to change on a showing that the state proceedings were being delayed . . . , or that the state courts were not applying the federal [Arbitration] Act, or that some other reason for a change had arisen." 460 U.S. at 30. The majority's response to that point was that it swept too broadly: "[V]irtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown; yet that does not make all pretrial orders 'inherently tentative' in the sense of that phrase in Coopers & Lybrand." 460 U.S. 12, fn. 14.[3]

Although the dissenting Justices were unpersuaded, their concerns about reviewing the stay order were based on the fact that the relevant circumstances could conceivably change, and counsel for a cessation or modification of the stay. Given the applicable federal policy goal,—to expedite arbitration consistent with the Arbitration Act—the desirability of a stay at a given point in time might indeed depend upon a prudential judgment of which forum, federal or state, would best effectuate the purposes of the Act.

But no variability of that sort was involved on the ruling presented here. The pertinent federal policy had an unchanging

[3] This analysis superseded the contrary view of the Seventh Circuit on the "conclusiveness" issue in *Microsoftware*, decided a year earlier than *Moses Cone Hospital*.

thrust. It condemned the very resort to a duplicative federal diversity suit when a diversity removal had been available. Thus, while the district court might have changed its mind later about *enforcing* such a policy, from an objective standpoint the policy itself was an unchanging mandate not to allow Mayacamas' suit to proceed. Unless the reasons for maintaining a good federal/state relationship were to disappear, or the practical requirements for maintaining it were to change, there was no way that Mayacamas' suit could have become, in time, any less of an affront to that relationship. In fact, it could become only more of an affront over time.

The ruling below was therefore "conclusive" for two different reasons. First, pursuant to the majority's analysis in *Moses Cone Hospital*, the ruling was issued as a final decision on this point. The district court's written order, with reasons stated (J.A. 147), bore every sign of a considered and final ruling that *Colorado River* abstention was not permissible: "[T]his Court must exercise its jurisdiction." (*Id.*) This closely resembled the posture of the state court in *Curry*, equally determined to exercise its jurisdiction notwithstanding the asserted federal policy. Neither order was inherently tentative, or likely in fact to be reconsidered as of course.

Additionally, though, the order in this case was "conclusive" in the way demanded by the *Moses Cone Hospital* dissent. No changing circumstances could later mitigate the need to carry out the Congressional policy by a stay. Not unlike a civil contempt, each day in the life of this lawsuit represented a new violation of a Congressional injunction against it. Allowing this suit to proceed, therefore, was not just a matter of prudential litigation management, analogous to the advancement or delay of a trial. *See*, 460 U.S. at 30. Here, the ruling was a failure to enforce a Congressional policy against *any* progress in this litigation. Such a ruling was plainly "conclusive" for *Cohen* purposes.

(4) The Order was Effectively Unreviewable on Appeal from a Final Judgment

The final requirement for *Cohen* appealability is that the ruling in question must "be effectively unreviewable on appeal from a

final judgment." *Cooper & Lybrand, supra*, 437 at 468. This requirement was plainly met by the order below: it allowed litigation to proceed contrary to a Congressional policy designed specifically to prevent such litigation from proceeding.[4]

The Congressional policy is wholly indifferent to the question of liability, so a reversal of a final judgment would afford no vindication at all from that standpoint. Its *only* concern is to avoid the maintenance of a federal action unnecessarily duplicating a removable state-court action. To await the final judgment for appellate enforcement of such a policy is to preclude any effective enforcement at all.

This case therefore presents a striking converse to *United States v. MacDonald, supra*, 435 U.S. 850, where the Court wrote that "Proceeding with the trial does not cause or compound the deprivation already suffered." *Id.* at 861. While the harm from a pretrial delay in a criminal case may not be aggravated by conducting the trial, the harm Congress sought to avoid from a duplicative diversity suit continues and mounts as litigation proceeds. More and more opportunities arise for federal/state conflicts and tensions. More and more senseless and costly duplication occurs. More and more likely it becomes that a federal *res judicata* interference will occur, when the state court will have expended a good deal of effort on the same dispute.

Thus, the prospect of a reversal of a final judgment in this kind of case affords no practical remedy to effectuate the applicable Congressional policy. Indeed, such a reversal could produce more federal/state friction, not less.

Assuming, of course, that the final judgment favors the federal plaintiff that spurned its removal forum, a reversal for that reason would provide a hollow vindication of the Congressional policy. Coming long after the state court had suffered the primary aggravations of a concurrent federal proceeding on the exact same

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[4] The reasoning of this section of the brief applies in like manner to the question of a temporary stay of the district court proceedings pending appeal. The further those proceedings advance, the less effective is the appellate remedy.

dispute, of what solace is a Court of Appeals opinion vacating the federal judgment? Whatever slim value such an opinion may have as a federal apology, it may easily cause far more trouble than it is worth. Probably undermining a *res judicata* defense in the state court, it would require new proceedings there, perhaps a full trial on the merits, long after a final state-court judgment and possibly a state appellate review. It seems fair to conclude that the federal "apology" from the Court of Appeals would usually arrive at an unwelcome time, and produce the opposite of the desired effect.

Most significantly, though, because the harm in this case is to public interests at least as much as to private ones, it cannot suffice to threaten the state-court defendant with a reversal of its judgment if it resorts to the wrong federal forum. It should not be allowed to calculate the risks and benefits, and honor the Congressional policy only if that seems prudent. While the reversal threat might suffice as deterrence in a case like *Richardson-Merrell*, where success on an "abusive disqualification motion . . . could jeopardize an ultimate jury verdict in his favor," 86 L.Ed.2d 354 (Brennan, J. concurring), only private interests were operating there. Here, to the contrary, the pertinent federalism concerns mandate a prevention of the harm, not merely a subsequent slap against the litigant who caused it.

(5) Conclusion

An appeal from a final judgment is essentially an irrelevant response to this kind of litigation. The irrelevance derives from all four of the *Cohen* criteria: importance, separateness, conclusiveness and effectiveness. Appeals from a final judgment miss the whole point, and would miss the whole problem.

B. If the "Collateral Order" Doctrine is Found to be Inapplicable, Appellate Jurisdiction Should be Upheld in This Case Under 28 U.S.C. § 1292(a) Or the All Writs Act

(1) "Enelow/Ettelson" Appealability

It is with some reluctance that Gulfstream suggests, as an alternative to the *Cohen* doctrine, that appellate jurisdiction lies in this case under the "*Enelow/Ettelson*" doctrine, named after *Enelow v. New York Life Ins. Co., supra*, 293 U.S. 379, and

Ettelson v. Metropolitan Life Ins., supra, 317 U.S. 188. As Gulfstream noted in its petition for certiorari, there is a split among the Circuits about the applicability of that doctrine to an order denying a *Colorado River* motion like the instant one.[5] While the importance of the issue in this case does require invocation of *Enelow/Ettelson* if *Cohen* is in fact unavailable, Gulfstream believes that the latter doctrine is the more desirable one from the standpoint of federal policy. It would be a more limited and justifiable exception to the final judgment rule.

Gulfstream therefore believes that the most desirable resolution of the Circuit conflict would be a holding (1) adopting *Cohen* appealability for the narrow class of cases where a duplicative diversity suit is allowed to proceed in lieu of an available removal action; and (2) rejecting *Enelow/Ettelson* appealability for other orders denying *Colorado River* motions, leaving appellate review to the traditional operation of the mandamus authority. Absent the removal factor, Gulfstream would agree with the Ninth Circuit's holding below that the stay decision was subject to the district court's broad discretion, and reviewable (or not reviewable) accordingly. When the removal factor is present, however, Gulfstream believes that discretion is sharply limited, and that *Cohen* appealability is required because mandamus is a remedy too uncertain for a problem this important (as is 28 U.S.C. § 1292(b)).

The last significant decision on *Enelow/Ettelson* was *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955), notable for a unanimous lack of enthusiasm on the Court for this doctrine. Both the majority and dissenting opinions deplore the fiction employed by the doctrine to transmute stay rulings into injunction rulings, and its arbitrariness in selecting only some stay rulings for that treatment. Although the Seventh Circuit applies *Enelow/Ettelson* in this area because it found *Cohen* unavailable,

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[5] While the Seventh Circuit finds the doctrine applicable, the divided Ninth Circuit below joined several other Circuits rejecting the doctrine. *See, e.g., Jackson Brewing Company v. Clarke*, 303 F.2d 844 (5th Cir. 1962), cert. denied 371 U.S. 891 (1962); *Andrews v. Southern Discount Co. of Georgia*, 662 F.2d 722 (11th Cir. 1981).

an opinion by Judge Posner has implored this Court to repudiate the former, and use the latter as the more rational and selective alternative. *See, Olson v. Paine, Webber, Jackson & Curtis*, 806 F.2d 731 (7th Cir. 1986). Indeed, Justice Black's dissenting opinion in *Baltimore Contractors* appears to make the same suggestion. *See*, 348 U.S. 185-186.

Nevertheless, although the *Enelow/Ettelson* doctrine may be "arbitrary, mischievous, and devoid of contemporary utility," *Olson, supra*, 806 F.2d at 734, the Seventh Circuit has correctly held that it applies to the denial of a *Colorado River* motion in a case precisely like this one. In *Microsoftware Computer Systems, Inc. v. Ontel Corp., supra*, 686 F.2d 531, Ontel brought suit in a New York State court for money owed under a contract. Microsoftware then filed a federal diversity suit in Illinois, "in connection with the sale of goods that is the subject of the New York State action." 686 F.2d at 533. Ontel moved for a stay of the federal action under *Colorado River*, and the motion was denied. Because the target of the motion was, as here, an action at law, and because "the stay was requested to interpose an equitable defense." *id.* at 536, the Seventh Circuit concluded that the two requirements for *Enelow/Ettelson* appealability were met.

The main question below under *Enelow/Ettelson* was whether Gulfstream's motion invoked an equitable "defense" or simply an equitable "consideration." Unlike the *Cohen* criteria, which are all relevant to the desirability of an interlocutory appeal, the *Enelow/Ettelson* criteria look primarily to legal history. The Seventh Circuit thus cited *High on Injunctions* (4th ed. 1905) to demonstrate that a *Colorado River* motion was analogous to the equitable bill of peace, "whose object is to restrain useless and vexatious litigation and to prevent a multiplicity of suits." Quoted at 686 F.2d 436. The Seventh Circuit drew further support for that analogy from *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952), which characterized the control of duplicative litigation in two federal courts as "equitable in nature." *Id.* at 183.

If the Court reaches and applies *Enelow/Ettelson* in this case, Gulfstream submits that the Seventh Circuit's analysis should be upheld. Because stays are the equivalent of injunctions for this

purpose, the bill of peace analogy seems irrefutable. The *Colorado River* motion asks for an "injunction" against a duplicative action at law on traditional equitable grounds, to avoid a multiplicity of suits. If the *Enelow/Ettelson* doctrine is still viable, this is its characteristic application. It is surely a "defense" to a lawsuit to demand that it be dismissed or stayed pending the outcome of another suit.

(2) Review By Writ Of Mandamus

If the district court's order was not an appealable one, Gulfstream's petition in the alternative for a writ of mandamus[6] provided the only avenue for an effective appellate review. However, the Ninth Circuit declined to entertain the case in that manner, either. Its reason, stated in a single sentence, was that "No serious hardship or prejudice will result from the order denying a stay or dismissal." (J.A. 154) The opinion went on to reject any "clear and undisputed right to the writ" (*id.*) anyway, even if review in that manner were appropriate.

There is no need to reargue in this context the important public interest that was prejudiced by the ruling below. (See *post*) It is quite apparent that the Court of Appeals saw nothing but private interests at stake in this case. Tersely dismissing the existence of any prejudice, the court obviously saw the stay dispute as just another tactical skirmish between private litigants.

Accordingly, it will suffice here to mention several of this Court's cases showing that the public importance of an interlocutory issue can add decisive weight to a petition for a writ of mandamus. A good example is *Beacon Theatres, Inc. v. Westover, supra,* 359 U.S. 500, whose significance has been described as follows: "Both the Court and the dissenters agreed that mandamus should issue to protect a clear right to a jury trial." *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, fn. 7 at 665. Chief Justice Rehnquist's opinion in *Will,* which reversed a writ of mandamus

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[6] As in *Moses Cone Hospital,* Gulfstream filed a timely notice of appeal in the district court, but also requested the Ninth Circuit, in the alternative, to hear the matter under the All Writs Act if the order was held not to be appealable. *See,* 460 U.S. at 8, fn. 6.

in a *Colorado River* stay case, distinguished *Beacon Theatres* on the grounds that the demands of the Seventh Amendment were simply too clear and too important to allow a jury trial to be postponed, and thus subordinated to a court trial. By contrast, the *Will* footnote quoted above observed that *Colorado River* made it "permissible," generally, for district courts to defer to concurrent state-court proceedings.

The *Will* Court was sharply divided, no opinion commanding a majority. Four dissenting Justices believed mandamus had properly issued to direct the district court to proceed to trial on two federal securities law claims. Of particular interest in the instant case, however, was the dissenters' reliance on the Congressional policy decision to give the federal courts exclusive jurisdiction over the pertinent claims:

> [A]s evinced by the exclusive jurisdiction of the federal courts to determine 1934 Act claims, the relevant federal policy here is the precise opposite of that found to require deference to the concurrent state proceeding in Colorado River. (437 U.S. at 673) (Brennan, J., dissenting)

Given that policy, and the potential *res judicata* or collateral estoppel effects of a state-court judgment on the federal claims, the *Will* dissenters concluded that mandamus was indeed an appropriate remedy. To them, the discretion normally attending a district court's handling of its cases could only be exercised in one way given the applicable federal policy. Only one decision was "permissible," as Chief Justice Rehnquist's opinion suggested in distinguishing *Beacon Theatres.*

While the foregoing policy analysis did not command a majority in *Will* as to the federal securities statute, a similar analysis should be adopted here. The important federal policy reflected in the removal statutes did dictate the proper exercise of discretion on Gulfstream's motion. In the extraordinary context of an identical diversity suit filed in lieu of a diversity removal action, and *a fortiori* when the new suit was filed a continent away from the local forum prescribed by 28 U.S.C. § 1441, only one ruling

was "permissible" when no countervailing justification had been presented.[7]

Just as this brief frequently noted in its analysis of *Cohen* appealability, the use of the mandamus remedy in the removal context would not be a generic writ prescription for all *Colorado River* rulings. Gulfstream's thesis, after all, is that the removal factor makes this case an "exceptional circumstance." There would be little chance of mistaking a mandamus holding in this context as a broad invitation to issue writs. To the contrary, the whole point of such a holding would be that, absent *Cohen* or *Enelow/Ettelson* appealability, the Congressional policy in the removal statutes makes the mandamus remedy a compelling necessity in this narrow type of case.

Beacon Theatres points the way. The Ninth Circuit, as in the instant case, had found that the ruling in question was a matter consigned to the district courts' discretion, and denied the writ of mandamus on that basis. This Court, in reversing and ordering the writ to issue, did not go so far as to deny the existence of any discretion on the court/jury issues there presented. Rather, given the Constitutional dimension of the jury trial right, the Court held that, "[T]hat discretion is very narrowly limited and must, whenever possible, be exercised to preserve jury trial. . . . [O]nly under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U.S. at 510-11.

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[7] We would also note *Matter of Skinner & Eddy Corp.*, 265 U.S. 86 (1924), where mandamus was approved to vindicate a litigant's right to select a state-court forum, in lieu of the Court of Claims, for its damages claim against an entity representing the United States Government. The opinion observed that the Court had recently found a plaintiff's right to dismiss its federal diversity action to be a "substantial" one, *Barrett v. Virginian R. Co.*, 250 U.S. 473 (1919), largely to avoid the practical frictions of a different rule in the federal courts from the local state courts. Thus, *Skinner & Eddy* found mandamus an appropriate remedy to vindicate the plaintiff's similar right in the Court of Claims, especially where the state-court action had already commenced and the federal proceeding would duplicate it.

Similarly, if the order in the instant case was not an appealable one, the writ of mandamus should have issued given (1) the importance of the removal policy, a policy of the exact same vintage and nearly equivalent significance as the Seventh Amendment;[8] and (2) the "narrowly limited" district court discretion to allow this type of litigation to proceed. As in *Beacon Theatres*, there may well be "imperative circumstances" that could justify a duplicative diversity suit in lieu of a removal action, although Gulfstream "cannot now anticipate" any. 359 U.S. at 511. Mandamus should certainly have issued below, however, assuming it was needed, because no such circumstances appeared.

II

THE FRAMERS' JUDICIAL COMITY POLICY, REFLECTED IN THEIR DESIGN OF THE REMOVAL PROCESS, DEMANDED A STAY OR DISMISSAL OF THE DUPLICATIVE FEDERAL ACTION BELOW

A. The Fear of "Clashing Jurisdictions"

The federal removal process originated in the Judiciary Act of 1789, 1 Stat. 73, § 12, which was the first order of business in the First Congress of the United States. *See generally*, Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L.R. 49 (1923-24) ("Warren"). Removal was conceived and designed by the Senate's special drafting committee, five of whose original eight members "had served in the Federal Convention of 1787. . . . " Warren, p. 57. Thus, the legislative history of removal is not limited to the debates on the proposed Act; it includes the design and birth of the republic itself.

The history of removal confirms a fundamental and unmistakable intent of the Framers in its basic design—an intent to minimize frictions between the state courts and the proposed new federal district courts. The evidence of that intent is far clearer and far stronger than the equivalent evidence found sufficient in

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[8] The First Congress considered the proposed Judiciary Act at the same time as the jury trial Amendment, and as closely related issues. See below, Warren, pp. 111-121.

Colorado River to justify the dismissal of a federal action as an "exceptional circumstance." As recently as *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1982), two Justices still criticized *Colorado River* for relying on a "tenuous foundation of a perceived congressional intent that has never been articulated in statutory language or legislative history. . . ." 463 U.S. at 580 (Stevens, J. dissenting). Here, to the contrary, the Framers' intent in designing the new system of district courts was revealed in the sustained and frequently bitter debate on that subject.

In the fall of 1987, the Supreme Court of the United States will be considering this federal diversity suit filed in Northern California, when the prescribed federal removal forum for this dispute was in Georgia. It is only fitting, therefore, to recall an argument by a leading Anti-Federalist, "The Federal Farmer," published on October 10, 1787, opposing the entire concept of establishing federal courts with diversity jurisdiction:

> I do not, in any point of view, see the need of opening a new jurisdiction in these causes—of opening a new scene of expensive law suits—of suffering foreigners, and citizens of different states, to drag each other hundreds of miles into the federal courts.

The Anti-Federalist (Storing ed., 1985) ("Storing") p. 52.

It is hardly surprising, therefore, that the Judiciary Act of 1789 specified a removal forum "in the district where the [state-court] suit is pending. . . ." *See*, Historical and Revision Notes, 28 U.S.C.A. § 1441 (1973 ed.), at p. 12. The whole idea of a federal judiciary had stimulated vigorous opposition to the Constitution. Patrick Henry, for example, had thundered that the proposed judiciary was "oppressively constructed." Storing, p. 309. He belittled the Federalists' assurances that "regulations *may* be made by Congress" to guard against judicial abuses, *id.*, p. 310 (original emphasis), and concluded by declaring himself, in reminiscent tones, "an infidel on that point till the day of my death." (*Id.*)

A central point of opposition to the judiciary article in the Constitution, and then to the Judiciary Act, was the repeated warning about clashing jurisdictions:

—"John Brown, a Congressman from the Kentucky district of Virginia, wrote that he feared 'great embarrassment and clashing' between the Federal and State Courts. . . ." Warren, p. 53.

—"[A] Virginia friend to Madison . . . [wrote,] "[T]here is a danger of clashing jurisdictions, . . . and this danger will exist where there are concurrent jurisdictions." *Id.*, p. 64

—"[W]rote Edward Carrington to James Monroe, '. . . [S]hould the United States erect separate Courts, the probability is that bickerings will arise between the two jurisdictions. . . .' " *Id.*, p. 66.

—"Livermore of New Hampshire . . . 'contemplated with horror the effect of the [district court] plan,' and thought that he could see 'a foundation laid for discord, civil wars, and all its concomitants.' " *Id.*, p. 123.

—"Jackson of Georgia opposed the system as unnecessary, vexatious and expensive, 'calculated to destroy the harmony and confidence of the people.' " *Id.*

—Representative Smith urged the House to draw "a broad line of distinction, to assign clearly to each its precise limits, and to prevent a clashing or interference between them." *Gales & Seaton's History of Debates in Congress, 1789*, ("Gales & Seaton"), p. 829.

—Representative Stone argued that "the history of courts" showed that, "although they did not absolutely proceed to bloodshed, yet they put the whole community in commotion with their clashing jurisdictions. . . . [I]nstead of being found . . . planets rolling in their orbits, on the immutable principles of order, so as not to interfere with each other, they will be felt in concussion. . . . The clew of separate jurisdiction will twine into such a state of perplexity, as to render it impossible for human wisdom to disentangle it without injury." *Id.*, p. 842.

With a vigorous Anti-Federalist attack along those lines, the Constitutional Convention actually voted in the first instance against establishing any lower federal courts at all. 13 Wright,

Miller & Cooper, *Federal Practice and Procedure (2nd ed. 1984) ("Wright")*, § 3502, p. 5. But James Madison and James Wilson immediately introduced the compromise that was incorporated in Article III: the lower federal courts would be entrusted to the new Congress. Wright, p. 5. There, two years later, Representative Benson urged his colleagues that "[T]hey should endeavor to administer both [the federal and state court systems] with as little inconvenience to either as was practicable." Gales & Seaton, p. 835. James Madison agreed, observing that, if the jurisdiction of the federal district courts "be concurrent with the State jurisdictions, it does not follow that it will for that reason be impracticable." *Id.*, p. 843.

How well the First Congress fulfilled Madison's words is a matter for historians to judge. But its *intent* to fulfill them cannot be gainsaid. If it is true that "The Anti-Federalists are entitled . . . to be counted among the Founding Fathers, in what is admittedly a somewhat paradoxical sense," Storing, *supra*, Introduction, p. 1, it is because their criticisms were in fact taken into account in the structure of the Constitution and the federal judiciary, down to the design of the removal process.

As the quotations earlier in this brief suggest, "There was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists . . . as that which gave them power over 'controversies between citizens of different States.'" Warren, p. 81. Diversity jurisdiction was conferred at the outset, however, eighty-six years before Congress gave the federal courts a general federal question jurisdiction. Wright, pp. 9-10. Diversity was also an original basis for the removal of a state-court case. 1 Stat. 73, § 12. Yet, this was the archetypical setting for concurrent jurisdictions.

Accordingly, given the persistent Anti-Federalist warnings about clashing jurisdictions, the Senate committee that originated the removal process, Wright, § 3503, p. 10; Warren, pp. 57-59, set out to create as harmonious a court system as possible. These Framers—including bitter Constitutional adversaries, Oliver Ellsworth of Connecticut and Richard Henry Lee of Virginia, Warren, p. 58,—came up with a basic design of the removal process that survived state-court resistance in New England in 1812, the

nullification episode in South Carolina in 1833, and the stresses of the Civil War. Warren, pp. 91-92. Their design of removal has continued to serve the basic purposes of providing a federal forum in diversity cases, and has done so in a manner that minimizes "clashing" between courts of concurrent jurisdiction.

B. The Intent of the Removal Statutes Required A Stay or Dismissal of this Duplicative Diversity Action

If the history of removal were to be forgotten, and lawsuits like the instant one were tolerated, the warnings of the Anti-Federalists would prove amply justified. Duplicative diversity suits are the precise evil the Framers sought to avoid.

This Court most recently summarized the *Colorado River* holding as follows: "[S]trong federal policy concerns favored resolution in the nonfederal forum." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. ____, 94 L.Ed.2d 10, 108 S.Ct. ____ (1987). The analogous federal policy concerns in the instant case have long been recognized by this Court, though not yet applied in the removal context. A duplicative federal action threatened "tension and controversy between the federal and state forums. . . ." *Arizona v. San Carlos Apache Tribe, supra*, 463 U.S. at 569. "Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." *Brillhart v. Excess Ins. Co. of America, supra*, 316 U.S. at 495. It only bears emphasis that the normative "should" in *Brillhart* reflects more than a judicial preference. It derives from a fundamental concern of the Framers.

Federal lawsuits like the instant on are just as duplicative and gratuitous as those criticized in *Brillhart*. However, they represent a far more serious affront to the "interrelationship of the state and federal courts." 316 U.S. at 409. For their interference with the state courts is worse than unnecessary; it contravenes one of the nation's oldest devices for minimizing this very kind of interference, and its strains on the federal system in diversity cases.

Removal has always been designed so that only one court, the federal court, would adjudicate the diverse parties' dispute. There would be no concurrent proceedings, with their inevitable frictions. Moreover, the removal forum was always the local federal

district, and removal always had to take place at the outset,[9] before the state court would involve itself significantly in the dispute. These, too, are features designed to minimize friction between two court systems.

Accordingly, if a federal diversity plaintiff could have had a federal forum by removal, and thus avoided duplicative litigation *and* federal/state conflicts in the process, then the federal courts should carry out the intent of Congress by staying or dismissing the duplicative federal action. Here, as in *Colorado River* with the McCarran Act, the removal statutes have long pointed the way to a sensible and politically sound allocation of federal and state judicial resources. State-court defendants like Mayacamas, who spurn their prescribed mode of access to the federal courts by removal, cannot be heard to complain when their unnecessary and duplicative federal suits are stayed or dismissed.

The historical policy of the removal statutes demands a strong presumption of deferral to the prior state-court litigation. When *Colorado River* and its progeny speak of "exceptional circumstances" being required for a federal court to defer to parallel state-court proceedings, their premise is that litigants are presumptively entitled to the only federal forum Congress has provided for them. Even when there are no federal claims in the suit, in pure diversity cases like this one, the federal courts are said to have a "virtually unflagging obligation" to exercise their jurisdiction when it is invoked in the only way possible.

However, the presumption against abstention should be reversed when a litigant *has* a federal forum available, by removal, but fails to take advantage of it. Such a litigant is in no position whatsoever to claim that a Congressionally mandated federal forum is being withheld. The only thing being withheld is a *disfavored* federal forum, when the favored one was fully available but declined. *See, Evans Transp. Co. v. Scullia Steel Co.*, 693 F.2d 715, 719 (7th Cir. 1982) (When removal was avoided, "[T]he question is not whether the federal claimant shall have

[9] There was one brief period during which removal could be effected until the time for trial. *See, Shamrock Oil & Gas Corp. v. Shets*, 313 U.S. 100, 106 (1941)

access to a federal court but which federal court he shall have access to . . . .") In this narrow and easily identified class of cases, state-court defendants should presumptively be restricted to that status when they turn their backs on the federal removal forum Congress has prescribed for them. There should be a "virtually unflagging" inhospitality to their circumvention of removal, and invitation to federal/state conflicts.

A fortiori, the federal suit should be stayed or dismissed when, in addition to circumventing the removal statutes in general, the plaintiff also circumvents their explicit insistence on the local federal forum. If, for example, Mayacamas believed that California was a more convenient or otherwise appropriate place for trial than Georgia, the removal venue, its proper remedy lay under the transfer statutes, 28 U.S.C. § 1404 *et seq.* Choice of law, and all other aspects of a requested change in federal venue, would be guided by carefully developed principles, *e.g., Van Dusen v. Barrack*, 376 U.S. 612 (1964), not the whim of the state-court defendant.

The Seventh Circuit stands with leading commentators and several lower courts in calling for stays to combat duplicative federal suits, and specifically to avoid circumvention of the removal statutes. *E.g.*, Kurland, Toward a Cooperative Judicial Federalism, 24 F.R.D. 481 (1959); Currie, The Federal Courts and the American Law Institute (Pt.II), 36 U.Chi.L.R. 268, 335 (1969); Note, Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits, 60 Colum.L.R. 684, 704 (1960); Note, Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of *Colorado River*, 44 U.Chi.L.R. 641, 667-71 (1977); *Prudential Ins. Co. v. McDowell*, 570 F.Supp. 21 (W.D. Pa. 1983). The Ninth Circuit, however, has approached this case as nothing more than a review of ordinary discretion in ruling on a stay request.

The diversity plaintiff who prevailed in *Moses Cone Hospital* had unsuccessfully attempted to remove the prior state-court action. *See*, 460 U.S. 7, fn. 4. Here there was no such attempt. In the circumstances of this case, that failure demands a reversal of the decisions below. This Court has already expressed tentative support for the Seventh Circuit's approach in a footnote in *Moses*

Cone Hospital, 460 U.S. 17 fn. 20. It should now make that support explicit, especially for the well defined class of duplicative federal suits circumventing the removal statutes.

CONCLUSION

For the reasons stated in this brief, petitioner requests this Court to reverse the judgment of the Court of Appeals dismissing the appeal and denying a writ of mandamus, and to hold that the Court of Appeals should have ordered either a stay or a dismissal of the instant diversity action under such appellate jurisdiction as this Court may deem applicable.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 86-1329

In The

Supreme Court of the United States

October Term, 1986

GULFSTREAM AEROSPACE CORPORATION,
A Georgia corporation,

Petitioner,

vs.

MAYACAMAS CORPORATION,
a California corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Is the denial of a motion to stay or dismiss proceedings a final decision appealable as a "collateral order" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 451 (1949)?

2. Is the denial of a motion to stay or dismiss proceedings an interlocutory order refusing an injunction and appealable pursuant to 28 U.S.C. § 1292(a)(1)?

3. Did the district court clearly abuse its discretion or exceed its authority in deciding that no exceptional circumstances existed which would permit the abandonment of its jurisdiction to adjudicate a diversity action?

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The opinion below is reported as *Mayacamas Corp. v. Gulfstream Aerospace Corp.*, 806 F.2d 928 (9th Cir. 1986).

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SUPREME COURT JURISDICTION

Jurisdiction for the matter is conferred by 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

In addition to the statutes set forth in Petitioner's Brief on the Merits, this case involves the following statute:

(3) 28 U.S.C. § 1332(a) and (c)

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

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STATEMENT OF THE CASE

Respondent supplements petitioner's statement as follows:

On August 13, 1985, two weeks prior to the date on which Mayacamas allegedly breached its contract with Gulfstream, and nearly two months before Gulfstream filed its one count breach of contract action in Georgia state court, Roger L. Mosher, President of Mayacamas, wrote to Gulfstream and notified them that, in his opinion, Gulfstream was in breach of the covenant of good faith and fair dealing implied in the contract between them. He said that litigation would be forthcoming unless Gulfstream returned Mayacamas' deposit and paid $500,000.00 for damages suffered by Mayacamas. (J.A. 115-117)

Mayacamas has contested, and continues to contest, the Georgia court's assertion of personal jurisdiction over

it. Mayacamas contends that it has not purposefully done any act or consummated any transaction which would confer general or specific jurisdiction in Georgia. The transaction at issue in the lawsuit was initiated in the Northern District of California by an officer of Gulfstream who resided in and conducted business in San Mateo, California; Mayacamas executed the contract in the Northern District of California; all negotiations were conducted in the Northern District of California; and the only contacts of Mayacamas with Georgia in connection with the transaction were correspondence or telephone calls, insufficient to confer jurisdiction. (J.A. 127-133, 102-111)

Gulfstream, on the other hand, has never contested the jurisdiction of the United States District Court for the Northern District of California to hear the case now before it.

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SUMMARY OF ARGUMENT

The order of the district court refusing to stay or dismiss the proceedings before it was not appealable, since it was neither a "final decision" within the meaning of 28 U.S.C. § 1291 nor an interlocutory order refusing an injunction appealable pursuant to 28 U.S.C. § 1292(a)(1).

Although certain "collateral orders" are appealable under § 1291, these orders have involved the deprivation of protected interests. No protectable interest was involved in the instant case and the court's order nevertheless did not conclusively determine petitioner's right to a stay, did not resolve an important issue completely sepa-

rate from the merits of the action and is effectively reviewable on appeal from a final judgment.

Also, the order was not sought to permit the prior determination of an equitable defense or counterclaim and, therefore, was not appealable under § 1292(a)(1) pursuant to the "*Enelow/Ettelson*" rule. The concern for avoiding wasteful and duplicative litigation does not raise an equitable defense or counterclaim but rather is an equitable consideration to be weighed by the trial judge in exercising his discretion to control litigation before the court.

Even assuming that the order was appealable, the district court did not clearly abuse its discretion or exceed its authority when it determined that no exceptional circumstances existed which justified the abandonment of its obligation to adjudicate the matter before it. The fact that respondent could have removed the Georgia state action to a federal court in Georgia, but chose instead to institute legal action in the Northern District of California, is insufficient, either by itself or in combination with other factors, to justify a stay of the federal action. Respondent contests the jurisdiction of the Georgia courts and is entitled to institute a diversity action in a federal court with unquestioned personal jurisdiction over both parties.

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ARGUMENT

I

THE DISTRICT COURT'S ORDER IS APPEALABLE ONLY AFTER FINAL JUDGMENT

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Flanagan v.*

United States, 465 U.S. 259, 263 (1984), quoting *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). This jurisdictional rule ordinarily requires that a party raise all claims of error in a single appeal following final judgment on the merits. *Id.*

> The final judgment rule serves several important interests. It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time consuming appeals. It is crucial to the efficient administration of justice.

Id. at 263-264.

Petitioner first argues that the order was a final "collateral order" and, therefore, a final decision appealable under 28 U.S.C. § 1291. Alternatively, it is asserted that the order was appealable as an interlocutory decision refusing an injunction, pursuant to 28 U.S.C. § 1292(a)(1). Bearing in mind that the Court will "permit departures from the [final judgment] rule 'only when observance of it would practically defeat the right to any review at all'," *id.* at 265, respondent submits that appellate jurisdiction does not lie.

A. The District Court's Refusal To Abstain From Exercising Jurisdiction Is Not Appealable Under The "Collateral Order" Exception To 28 U.S.C. § 1291

Title 28, United States Code, § 1291 states, in relevant part, that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district

courts of the United States. . . ." Among the "final decisions" embraced by this statute are a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To come within this small class, an otherwise interlocutory order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Petitioner's attempt to fit within these boundaries fails in a number of respects.

First, in reaching its decision to proceed, the district court did not conclusively determine anything. To come within the exception, an order "must constitute a complete, formal, and, in the trial court, final rejection of a claimed right." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981). Had the district court *granted* a stay, one could reasonably infer that the judge expected the state court to resolve all relevant issues, barring further litigation in the federal court through principles of res judicata. *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 12 (1983). Further, the litigants would be "effectively out of court" and there would be "no basis to suppose that the District Judge contemplated any reconsideration of his decision to defer to the parallel state-court suit." *Id.*

The decision to *proceed*, on the other hand, is more "inherently tentative," and is similar to a refusal to certify a class under Rule 23(c)(1), Federal Rules of Civil Procedure, in that it is more likely to be altered or amended before rendering a decision on the merits. *Coopers & Lybrand*, 437 U.S. at 469. As the federal and state litigations proceed, any number of circumstances could change in such a way as to justify the federal court's surrender of jurisdiction[1] It is reasonable to expect that any changed circumstances favoring the stay of the federal action would quickly be brought to the attention of the district court.

Second, the district court's decision to exercise its jurisdiction does not resolve an important issue completely separate from the merits. While an order that amounts to a refusal to adjudicate the merits may present an important issue separate from the merits, *Moses H. Cone*, 460 U.S. at 12, the decision to proceed to an adjudication on the merits does not do so. The requirement that the issue resolved must be "completely separate from the merits" is a "distillation of the principle that there should not be piecemeal review of 'steps toward final judgment in which they will merge.' " *Id.* at 12, n. 13, quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541. This, in turn, stems from a recognition that appellate courts should not interfere with the district courts' management of their ongoing proceedings. *Id.* at 31 (Rehnquist, J., Burger, C.J., and O'Connor, J. dissenting).

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[1] Among the factors which could conceivably be affected or uncovered by the discovery process are the relative progress of each lawsuit, the vexatious nature of the federal action and the convenience to the parties and witnesses of the state forum.

This limitation on the power of appellate courts is of special significance when a district court denies a request for a stay. The power to stay proceedings is incident to the power inherent in every court to control the disposition of the causes on its docket. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Where a judge exercises that authority so as to refuse to proceed at all, there is no step towards final judgment, and appellate court review is justified. In the case now before the Court, however, the district court determined that it should exercise its jurisdiction, and the matter is proceeding toward final judgment. If the appellate courts are going to pass upon the propriety of that determination, they should heed the congressional command of 28 U.S.C. § 1291 and await final judgment.

While a district court's disregard of its "virtually unflagging obligation" to exercise jurisdiction, *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), so as to effectively put a federal plaintiff out of court, is sufficiently important to justify immediate review, *Moses H. Cone*, 460 U.S. at 12, an order which merely places a litigant at a procedural disadvantage is not so important. *Id.* at 35 (Rehnquist, J., Burger, C.J., and O'Connor, J. dissenting).

The order now before the Court does not even go so far as to put petitioner at a procedural disadvantage. In refusing to abstain, the district court merely *prevented petitioner from gaining a procedural advantage*. The district court found no exceptional circumstances to justify abandonment of the general rule that parallel state and federal proceedings should ordinarily continue forward simultaneously until such point as one becomes res judicata upon the other. Petitioner contends that the court erred

in doing so, and objects to the additional expense and irritation which it sees as a natural consequence of the court's decision. However, neither a perception that the appellant should prevail upon an appeal, *Moses H. Cone*, 460 U.S. at 35, (Rehnquist, J., Burger, C.J., and O'Connor, J. dissenting), our expense and irritation, *New England Power Co. v. Asiatic Petroleum Corp.*, 456 F.2d 183 (1972), are sufficiently serious to justify a departure from the rule of finality.

Petitioner cites *Mitchell v. Forsythe*, — U.S. —, 105 S.Ct. 2806 (1985), *Local No. 438 v. Curry*, 371 U.S. 542 (1963) and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), to demonstrate that the district court's refusal to abdicate its obligation to exercise jurisdiction implicated an important federal policy which would justify immediate review. These cases are readily distinguishable. In each of these cases, as in *Moses H. Cone*, 460 U.S. 1, the district court precluded a party from litigating in a forum which is favored by federal policy. In the case at bar, however, no courthouse doors have been closed. To the contrary, the district court refused to close its doors, in recognition of its obligation to remain open.

Petitioner argues that the appropriate federal forum in this case is in the Southern District of Georgia. The merits of this argument will be addressed below. The effect of the disputed order was to keep the parties before the federal court. While certainly important in terms of its effects on tactical considerations, the order is not one of such magnitude to require immediate review.

Finally, the refusal to stay proceedings is subject to review on appeal from a final judgment. A party is not

entitled to immediate review of a collarteral order unless the order otherwise can never be reviewed at all. *Mitchell v. Forsythe,* — U.S. —, 105 S.Ct. at 2815; *see also Firestone Tire & Rubber Co.,* 449 U.S. at 376 ("denial of immediate review [must] render impossible any review whatsoever"); *Flanagan v. United States,* 465 U.S. at 265 (waiting for appeal from final judgment "would practically defeat the right to any review at all"). If, as petitioner contends, the district court erred in going forward with this litigation, any judgment rendered by it would be appealable and subject to reversal on this ground. If the state proceeding had not yet reached final judgment, petitioner could request a stay of that action pending the outcome of the federal appeal, and upon the reversal of the federal action the state suit could be recommenced. No rights whatsoever would have been lost.

Since the order of the district court did not conclusively determine the issue, did not resolve an important issue completely separate from the merits, and is effectively subject to review on appeal from final judgment, the decision is not appealable as a collateral order. In reaching this conclusion, the Ninth Circuit found that it need not even consider the *Cohen* factors, since petitioner had failed to meet the threshold requirement that a "protected interest" be involved (J.A. 153).

Petitioner asserts that there is no protected interest formula. Petitioner's Brief at 6. The "claim of right" language of *Cohen,* however, appears to establish a mandatory prerequisite of an alleged deprivation of a protectable interest. *See, In re Cement Antitrust Litigation (MOL No. 296),* 673 F.2d 1020, 1024 (9th Cir. 1982). Whether petitioner is stopped at the threshold or after analysis of

the *Cohen* test, however, the court of appeals properly ruled that the order was not appealable as a final decision.

B. The Order Cannot Be Appealed As An Interlocutory Order Refusing An Injunction Under 28 U.S.C. § 1292(a)(1)

Petitioner argues, "with some reluctance," that appellate jurisdiction lies alternatively under the "*Enelow/Ettelson*" extension of 28 U.S.C. § 1292(a)(1), which authorizes appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions. . . ." "The *Enelow/Ettelson*" doctrine derives its name from the Court's decisions in *Enelow v. New York Life Insurance Co.,* 293 U.S. 379 (1935), and *Ettelson v. Metropolitan Life Insurance Co.,* 317 U.S. 188 (1942), which, taken together, have been held to permit an appeal from an interlocutory order granting or denying a stay of judicial proceedings "if (a) the action in which the motion for stay was made could have been maintained as an action at law before the merger of law and equity, and (b) the stay was sought to permit prior determination of an equitable defense or counterclaim." *Danford v. Schwabacher,* 488 F. 2d 454, 455 (9th Cir. 1973).

This Court has warned that:

> reliance on the analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action. The incongruity of taking jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations.

Baltimore Contractors v. Bodinger, 348 U.S. 176, 184 (1955).

The Seventh Circuit nonetheless has continued to apply the rule to prematurely review district court refusals

to grant *Colorado River* stays. This position should be rejected. The "*Enelow/Ettelson*" doctrine is an unnecessary and outmoded extension of a limited legislative exception to the final judgment rule, and, even if it were not, the rule as traditionally recognized is inapplicable to orders denying *Colorado River* stays.

Colorado River stays are granted or rejected based on principles of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River*, 424 U.S. at 817. A request for such a stay does not raise an "equitable defense or counterclaim" as required by the "*Enelow/Ettelson*" rule. Rather, the lower court is asked to stay its proceedings as an exercise of its discretion in the control of its calendar. The decision not to abstain from exercising jurisdiction over the federal diversity action does not affect an equitable defense or counterclaim available to petitioner in either of the pending actions and, therefore, is not appealable. *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1073 (3rd Cir. 1983); *Andrews v. Southern Discount Company of Georgia*, 662 F.2d 722 (11th Cir. 1981); *Cotler v. Inter-County Orthopaedic Association, P.A.*, 526 F.2d 537, 541 (3rd Cir. 1975); *Jackson Brewing Company v. Clarke*, 303 F.2d 844 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962).

The order now before the court is not reviewable under the recognized interpretations of appellate jurisdiction. If, as petitioner contends, the removal statute, standing alone, evinces a federal policy of such strength and importance that appellate courts should expeditiously be thrust into the *Colorado River* fray, then Congress is the appropriate body to expressly declare that policy and

create an exception which will allow courts of appeal to protect its integrity:

> The Congress is in a position to weigh the competing interest of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction. This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money.

Baltimore Contractors v. Bodinger, 348 U.S. at 181 (citations and footnote omitted).

Given the federal policy against piecemeal appeals, the scope of 28 U.S.C. 1291(a)(1) should be carefully limited, "lest a floodgate be opened that brings into the exception many pretrial orders." *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966). The order should be found to be subject to appeal only following the entry of final judgment.

II

THE COURT OF APPEALS PROPERLY REFUSED TO ISSUE A WRIT OF MANDAMUS

Anticipating that the district court order would be found not appealable, petitioner requested that the court of appeals alternatively treat its notice of appeal as a petition for writ of mandamus under Title 28, United States Code, § 1651. Although this Court has not addressed the circumstances under which a notice of appeal

may be converted into a writ of mandamus, given the extraordinary nature of the remedy, the Ninth Circuit is undoubtedly correct in treating conversion as a step which should be taken "stingily." *Varo v. Comprehensive Designers, Inc.*, 504 F.2d 1103, 1104 (9th Cir. 1974).

The writ of mandamus should not become a substitute for the notice of appeal, lest it "undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978), quoting *Will v. United States*, 389 U.S. 90, 98, n. 6 (1967). Heeding this command, the Ninth Circuit would convert a notice of appeal into a petition for writ of mandamus only if "serious hardship or prejudice to the appellants would have resulted if the issues raised had not been decided prior to trial, or the orders would not have been reviewable at all on appeal from a final judgment." *Hartland v. Alaska Airlines*, 544 F.2d 992, 1004 (9th Cir. 1976) (Wallis, C.J., concurring). "In general, where no serious hardship or prejudice would result, [appellate courts] would be better advised, even when . . . confronted with an extreme usurpation of power, to remand for a certification of the appeal . . . or to grant leave to file a petition for mandamus. . . . " *Id.*

Petitioner did not show that it would suffer serious hardship or prejudice by waiting for final judgment to appeal the order of the district court. The Ninth Circuit properly refused to entertain the notice of appeal as a petition for writ of mandamus.

Even if the notice of appeal had been treated as a petition for writ of mandamus, however, petitioner would not have been entitled to the writ. "Only exceptional circumstances amounting to a judicial 'usurpation of power'

will justify the invocation of this extraordinary remedy." *Kerr v. United States*, 426 U.S. 394, 402 (1976), quoting *Will v. United States*, 389 U.S. at 95. Since the remedy of mandamus is "a drastic one, to be invoked only in extraordinary situations," *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980), the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Will v. United States*, 389 U.S. at 95.

Upon a petition for writ of mandamus, petitioner would bear the "burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953). This burden cannot be met where, as here, the decision challenged on appeal is one left to the discretion of the district court, since "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' " *Allied Chemical Corp.*, 449 U.S. at 36; *Will v. Calvert Fire Insurance Co.*, 437 U.S. at 666-667.

In a desperate attempt to obtain the relief it seeks, petitioner contends that respondent's decision not to avail itself of removal jurisdiction so sharply limited the district court's discretion that an exercise of the appellate court's mandamus authority was appropriate. This contention, however, is without authoritative support, contrary to the intent of Congress, and alien to the principles upon which *Colorado River* abstention is based. It should be rejected.

III

THE DISTRICT COURT CORRECTLY DECLINED TO SURRENDER ITS JURISDICTION

A. The Standards Set Forth In Colorado River And Moses H. Cone Require That The Court Proceed With The Action Before It

The circumstances under which a federal district court is justified in disregarding its "virtually unflagging obligation to exercise the jurisdiction given it" on the ground of "wise judicial administration" were set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

The long-standing rule that the pendency of an action in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction remains intact. *McClellan v. Carland*, 217 U.S. 268, 282 (1910); *Colorado River*, 424 U.S. at 817. However, after a "careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction," *Moses H. Cone*, 460 U.S. at 16, a district court may conclude that there exist "exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813. "Only the clearest of justifications will warrant dismissal." *Id.* at 819.

In arguing before the district court that a stay was appropriate, petitioner addressed the "important factors" identified in *Colorado River* and *Moses H. Cone*. A stay was necessary, it was asserted, because:

1. No federal claims were involved (J.A. 23);

2. There was a complete identity of parties (*Id.*);

3. The Georgia action was filed first (J.A. 24);

4. The state court was able to protect respondent's rights (*Id.*);

5. The state forum was more convenient (*Id.*);

6. The action in Georgia was proceeding (J.A. 25); and

7. There was an inference that the federal action was a "defensive tactical maneuver." (*Id.*)

Respondent addressed each of these factors in its response (J.A. 86-101) and the district court concluded that the facts of the case fell short of those necessary to justify abstention (J.A. 147).

In its brief before this Court, petitioner virtually concedes that all of the circumstances of this case are decidedly unexceptional for abstention purposes, except for one. That factor, mentioned only in passing in its reply brief to the district court (J.A. 142-143) was the opportunity available to respondent to remove the state court action to a federal court in Georgia. As will be discussed *infra*, this factor, either alone or in combination with the recognized factors, does not create "exceptional circumstances" justifying abstention.

B. Respondent's Decision Not To Avail Itself Of Removal Jurisdiction Does Not Require A Surrender Of The Federal Court's Original Diversity Jurisdiction.

Petitioner strenuously argues that respondent's decision not to remove the Georgia state action to the federal

court for the district where the state action was pending calls for a stay of the federal action instituted by respondent in the Northern District of California. It is unclear, however, whether petitioner is asserting that the failure to seek removal is simply a factor for the court to consider[2] or whether it is seeking to create a new abstention doctrine.[3] Regardless, the availability of removal is an inconsequential factor, beyond the scope of either the *Colorado River* doctrine or principles of abstention.

Abstention doctrines have been developed with great care to assure that only the clearest of justifications will permit surrender of jurisdiction. Traditionally, abstention was based on concerns of comity and state-federal relations, together with some important policy that would justify such deference. The doctrine of abstention was recognized as "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," *Colorado River*, 424 U.S. at 813, and prior to *Colorado River* the circumstances appropriate for abstention were confined to three general categories.

Pullman-type abstention, named after the Court's decision in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), allows a federal court to refrain from exercising jurisdiction to avoid an unnecessary determination of a federal constitutional question which might be

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2 "In the circumstances of this case, that failure [to remove] demands a reversal of the decisions below." Petitioner's Brief at 29.

3 "[I]f a federal diversity plaintiff could have had a federal forum by removal . . . then the federal court should carry out the intent of Congress by staying or dismissing the duplicative federal action." Petitioner's Brief at 28.

mooted or presented in a different posture by a state court determination of pertinent state law. *Colorado River*, 424 U.S. at 814; *Gibson v. Berryhill*, 411 U.S. 564, 580 (1973). This principle promotes the long-standing rule that courts should not decide cases upon constitutional grounds unless no alternative to its adjudication is open. *Pullman*, 312 U.S. at 498.

Younger-type abstention initially required that the federal court refrain from interfering with pending state court criminal proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). More recently, this court has recognized *Younger*-type abstention with respect to state civil proceedings in which the state is a party and which are closely related to and touch upon the same interests as those which are protected by the state criminal justice system, *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975), which go to the core of the administration of a state judicial system, *Juidice v. Vail*, 430 U.S. 327 (1977), or which implicate some other important state interest, *Middlesex County Ethics Committee v. Garden, etc.*, 457 U.S. 423 (1982). *Younger*-type abstention addresses the long-standing public policy against federal court intercession in state court proceedings. *Younger*, 401 U.S. at 43.

Burford-type abstention recognizes that a case which involves a predominantly state interest which is best handled by a state court may preclude federal court intervention so long as any asserted federal rights are adequately protected in the state court. *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975); *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315

(1943). This type of abstention, however, should not be invoked merely because a case may turn on a difficult or unsettled question of state law. *Meredith v. City of Winter Haven,* 320 U.S. 228, 234 (1943). This doctrine recognizes that questions of substantial public import, the importance of which transcends the result in the case at bar, should be decided by the forum best equipped to handle the question. *Burford,* 319 U.S. at 317-318; *Colorado River,* 424 U.S. at 814.

Abstention on any of these grounds is most appropriate where the federal plaintiff seeks an intrusive form of relief. Almost universally, cases in which abstention is proper involve requests for declaratory or injunctive relief. If the federal court's determination of whether such relief should be granted would thrust it into an area more appropriately reserved to the states, abstention may be warranted. Finally, with the exception of federal court intrusion into state criminal proceedings, *Colorado River,* 424 U.S. at 817 n. 22, the decision whether to abstain is left largely to the discretion of the district court judge. *Gibson v. Berryhill,* 411 U.S. at 580; *Alabama Public Service Commission,* 341 U.S. at 345.

It is within this framework that the still developing *Colorado River* doctrine, and the place, if any, that removal plays in it should be viewed. An analysis of *Colorado River* and *Moses H. Cone* reveals that, although "unrelated to considerations of proper constitutional adjudication and regard for federal-state relations," *Colorado River,* 424 U.S. at 817, abstention on grounds of wise judicial administration shares many of the same concerns, and serves many of the same purposes, as the more traditional forms of abstention.

First, and perhaps foremost, abstention is proper only under exceptional circumstances. *Colorado River,* 424 U.S. at 818. Indeed, the circumstances permitting the surrender of jurisdiction are considerably more limited than under the traditional abstention doctrines since weightier considerations of constitutional adjudication and state-federal relations are absent. *Id.*

In *Colorado River,* the court found exceptional circumstances principally due to the McCarran amendment, which reflected a *clear* federal policy against piecemeal adjudication of disputes involving water rights. *Id.* at 819 (emphasis added). Petitioner contends that the removal statute, 28 U.S.C. § 1441, evidences a similarly clear federal policy in favor of resolving diversity suits in a particular federal court. No such federal policy can be derived from the history of the statute, which was created to protect an out-of-state defendant from local prejudices. There is no basis from which to conclude that the framers intended to foreclose other federal forums when they afforded such protection.

Second, underlying the concern for wise judicial administration lies an implicit but limiting reluctance to allow federal courts to intrude into actions that are more appropriately before state courts. In *Colorado River,* the federal plaintiff sought a declaration concerning its water rights in certain rivers and tributaries. Finding a policy favoring resolution of that question in state court, the Court held that the federal court justifiably refrained from imposing its judgment on the state court.

In *Moses H. Cone,* however, the federal plaintiff merely sought an order compelling arbitration. A federal

court's decision on this question would not intrude upon the state court's ability to determine the substantive issues before it. More importantly, there was no basis for finding that the state court was the more appropriate forum in which to resolve the substantive issues. On the contrary, there was a federal policy favoring arbitration, even in the face of a pending state proceeding.

The case now before the court is more analogous to *Moses H. Cone* than to *Colorado River*. There is no policy favoring the state court over the federal court. A federal court judgment will intrude upon the state court function only to the extent that it will have a res judicata effect. This intrusion is possible in any parallel litigation. Once again, the fact that the federal action is similar to a pending state action does not create an exceptional circumstance warranting surrender of federal jurisdiction.

The concern for federal intrusion into an action more appropriately before a state court can also be seen in the Court's concern with piecemeal litigation. If, as in *Colorado River*, the federal court is likely to make a determination on an issue without resolving the entire controversy, the state court, which is attempting to resolve the entire dispute, would be bound by the federal court determination. Under appropriate circumstances, for example where there is a policy favoring comprehensive resolution of the dispute, this could constitute an unwarranted intrusion into the state court function. Where, however, as in *Moses H. Cone*, piecemeal litigation is likely to occur regardless of which forum proceeds, or where, as in this case, a comprehensive resolution will result without regard to which forum proceeds, a federal court's determination

of substantive issues does not constitute an unwarranted intrusion into the state court proceeding. It is merely an inherent by-product of concurrent jurisdiction.

Third, the decision whether or not to stay is left largely to the discretion of the district court judge. *Will v. Calvert Fire Insurance Co.*, 437 U.S. at 663. This discretion, however, is strictly limited by the standards set forth by this Court. In this regard, although its recognition of a new form of abstention may be considered expansive, it just as appropriately may be characterized as a limiting decision.

Prior to the *Colorado River* decision, many lower courts engaged in the practice of staying or dismissing actions before them in deference to similar actions pending in state court, notwithstanding a lack of Supreme Court authority to do so. 1A *Moore's Federal Practice*, (2nd ed. 1985) at 2148, and cases cited therein at n. 6. *Colorado River* reemphasized the virtually unflagging obligation that those courts had to exercise their jurisdiction, and provided strict guidelines for the lower courts to follow in deciding whether or not to abstain. The *Colorado River* decision did not opine as to whether the McCarran amendment *required* federal court abstention, but merely stated that the amendment, in conjunction with other factors, *justified* the district court's decision to dismiss in that particular case. *Colorado River*, 424 U.S. at 820 (emphasis added).

In this case, the district court applied the standards provided to it by this Court, had available to it petitioner's argument that the availability of removal jurisdiction required that it abstain from exercising its original diversity

jurisdiction, and determined that the federal action should proceed. This determination should be given considerable weight by the Court.

Viewing the *Colorado River* factors in the context of abstention principles in general, a workable standard emerges to guide lower courts when confronted with concurrent state jurisdiction. Abstention on grounds of wise judicial administration is appropriate only where, after a careful consideration and balancing of the relevant factors, a federal court, in its sound discretion, concludes that the state proceeding provides a fairer, more comprehensive, speedier and at least as well qualified forum for the resolution of the dispute. Where retention of jurisdiction by the federal court would frustrate these purposes, the federal court is allowed a broader discretion to surrender jurisdiction. Where a federal court would simply be acting as would a state court in applying settled law to the facts before it, without unduly thrusting itself into an action which is better suited to resolution in the state court, abstention is not appropriate. *See, County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 190 (1959). Further, there is a strong presumption in favor of the exercise of jurisdiction, and a court must find a reason to abstain, not a reason to exercise its jurisdiction. *Moses H. Cone*, 460 U.S. at 25.

The availability of removal jurisdiction cannot, by itself, constitute an exceptional circumstance justifying a federal court's surrender of original diversity jurisdiction. The removal statute, 28 U.S.C. § 1441, must be read in conjunction with the original diversity jurisdiction statute, 28 U.S.C. § 1332. Together, they provide a federal forum to diverse state court defendants, and to diverse federal court plaintiffs.

There is nothing in the express language of § 1441 that even suggests that the jurisdiction being created is exclusive or that, by its terms, it supersedes § 1332. If Congress had intended to restrict a legitimate federal plaintiff to a particular forum when he becomes a defendant in a state court action as a result of a race to the courthouse, it could have stated so in express language. In the absence of such language, the construction of the statute suggested by petitioner would require a level of judicial activism that is unwarranted by the purpose and intent of the removal statutes, and contrary to the policies surrounding the exercise of federal jurisdiction.

Petitioner argues that the history of the Federal Judiciary Act of 1789 reflects an intent of the framers to reduce federal state tensions through the removal process. Beyond the fact that it is of dubious relevance in today's world of modern interstate commerce, petitioner provides no support for this assertion. It is not surprising that, in 1789, there were anti-federalists who questioned the providence of creating a federal system of courts. By petitioner's own admission, the compromise that was reached entrusted the lower federal courts to Congress.

In exercising its grant of power over the lower federal courts, Congress has created two separate means by which they may obtain diversity jurisdiction. Under 28 U.S.C. § 1332, a *plaintiff* may hail a diverse defendant into federal court. Under § 1441, a state court *defendant* may hail a diverse state court plaintiff into federal court. Removal, therefore, "may . . . be regarded as an indirect mode by which the federal court acquires original jurisdiction. . . ." *Railway Co. v. Whitton's Admiral*, 13 Wall 270, 287-288

(1872). It is a concept designed to expand federal jurisdiction, not, as petitioner suggests, to limit it.

The purpose of the removal statutes is to give a non-resident defendant, who has been unwillingly brought into a state court, the right to remove to the presumably unprejudiced forum of the federal court. *Browne v. Hartford Fire Insurance Co.*, 168 F. Supp. 796 (N.D. Ill. 1959); *Hall v. Great Northern Railway Co.*, 197 F. 488 (D. Mont. 1912). This purpose is not frustrated by allowing a non-resident state court defendant, who has a legitimate claim against his state court plaintiff, from asserting that claim in the federal district in which he resides, provided the federal court has personal jurisdiction over the state court plaintiff.

This is consistent with the concerns of the framers. Under the Judiciary Act of 1789 as originally drafted, neither the plaintiff nor the defendant was required to be a citizen of the state where a diversity suit was brought. It was subsequently amended by the Senate so as to confine suits in the federal court to those brought in the state of which *either the plaintiff or the defendant* was a resident. Warren, "New Light on the History of the Federal Judicial Act of 1789," 37 *Harvard Law Review* 49, 79 (1923-24) (emphasis added). Petitioner asks this Court to conclude that, by winning the race to the courthouse, a state plaintiff can limit diversity jurisdiction to his home state.

Petitioner argues that the founding fathers' desire to reduce federal-state friction resulted in a removal statute which prohibits the institution of a federal action by a state court defendant in any district other than that to

which the case could have been removed. To accept this argument requires the conclusion that a rule providing for federal *usurpation* of power is less intrusive than a rule in which power is *shared* with the states. The long-standing rule which allows parallel actions to proceed concurrently, with the federal court bound to apply substantive state law and recognize prior judgments and factual determinations of the parallel state court, reduces federal-state friction to a minimum. A rule which encourages removal from state to federal court would only add to such friction.

Petitioner suggests that if a state court defendant's decision not to avail himself of removal jurisdiction does not mandate abstention it at least "demands a strong presumption of deferral to the prior state-court litigation." Petitioner's Brief at 28. There is no suggestion of what type of a showing would overcome such a presumption. Respondent submits that if the court determines that such a presumption has arisen it should be overcome under the circumstances of this case.

As an unwilling defendant in the Georgia action, respondent has contested, and continues to contest, the Georgia court's assertion of personal jurisdiction over it. In addition, the Federal District Court for the Southern District of Georgia would clearly be an inconvenient forum for respondent, although not necessarily inconvenient enough to successfully transfer the case on forum non conveniens grounds. It would be patently unfair for a federal court, in a case which is properly before it, to surrender its jurisdiction to a state court simply because the federal plaintiff chose not to remove the state court case to an inconvenient federal court, where state court jurisdiction is being challenged by the remover.

Respondent submits, however, that, at the most, a state court defendant's decision not to remove should be no more than a factor for the federal court to consider when ruling on a *Colorado River* motion. As a factor for consideration it should not even be afforded great weight, since to do so would foster races to the courthouse and make temporal priority in filing virtually determinative of whether a federal court should abstain, in direct contradiction of the guidelines set forth in *Moses H. Cone*.

CONCLUSION

Respondent had a statutory right to commence this action in the Northern District of California. Petitioner has failed to demonstrate that the district court erred in refusing to surrender jurisdiction or that the court of appeals improperly found the lower court's order not to be appealable. The decision of the Ninth Circuit Court of Appeals should be affirmed.

Dated: August 11, 1987

Respectfully Submitted,

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REPLY

BRIEF

No. 86-1329

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

GULFSTREAM AEROSPACE CORPORATION,
a Georgia Corporation,
Petitioner,

VS.

MAYACAMAS CORPORATION,
a California Corporation,
Respondent.

PETITIONER'S REPLY BRIEF

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Respondent.

PETITIONER'S REPLY BRIEF

Petitioner, Gulfstream Aerospace Corporation ("Gulfstream"), submits this brief in reply to the brief filed by respondent, Mayacamas Corporation ("Mayacamas"), and also to inform the Court of recent developments in the parties' concurrent litigation below in state and federal courts.

I

RECENT DEVELOPMENTS

The order under review in this case is the district court's refusal to dismiss or stay Mayacamas' diversity action in the Northern District of California, when its exact same dispute with Gulfstream was already before a state court in Georgia, and when Mayacamas concededly could have obtained a nonduplicative federal forum by removal, but failed to exercise that right.

The Georgia action was recently tried to a jury, which awarded Mayacamas $900,000. However, that sum was substantially less than the $5.5 million or more Mayacamas has demanded in its

federal court complaint (J.A. 13) and its identical state court counterclaim. (J.A. 85) Gulfstream therefore anticipates that Mayacamas will appeal from the state court judgment, and continue to prosecute its federal court action. The latter had an October 5, 1987 trial date, but it was vacated. As of this writing, no new trial date has been set.

It is settled practice that "[C]ounsel should disclose to the Court any and all facts that may raise a question as to mootness even though counsel is of the view that the case is not thereby rendered moot. . . ." Stern et al., *Supreme Court Practice* (6th Ed. 1986), p. 721. Gulfstream does not believe the issues before this Court have been rendered moot, or indeed any less significant than before. Although the Georgia action has reached the stage of a jury verdict, appeals are likely to keep the parties' dispute in the state court system for some time to come.

Accordingly, the federal court action will continue to proceed below on a concurrent basis with an identical and prior pending state court action between the same parties, on nothing but state law issues. Unless and until the federal court action either is dismissed with prejudice, or reaches a final appellate adjudication on the merits, its continuation on parallel tracks with the state court action fully maintains the justiciability and importance of the issues before the Court. Those issues will not lose their practical effects on the litigants unless and until there is no possibility of any further concurrent proceedings on the merits in this dispute, whether at the trial court or appellate court level.

II

REPLY TO RESPONDENT

Gulfstream has only a few points to add by way of reply to Mayacamas' contentions on the merits. Mayacamas repeatedly ignores significant contentions and authorities in Gulfstream's opening brief.

(A) The Appealability Issues

Mayacamas essentially asserts the absence of each of the criteria of appealability under *Cohen v. Beneficial Industrial Loan*

Corp., 337 U.S. 541 (1949), failing to confront Gulfstream's detailed arguments (at pp. 7-17) on each of those criteria. They need not be repeated here.

Along the way, however, Mayacamas twice confuses together the two different grounds on which appealability was upheld in *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1 (1983). At pages 6 and 8 of its brief, Mayacamas incorrectly cites the "effectively out of court" rationale as a *Cohen* factor. To the contrary, the opinion of the Court cited *Cohen* as an independent, alternative basis for appealability. Indeed, the opinion's invocation of the *Cohen* doctrine lends significant support for its applicability here.

In that regard, the "conclusiveness" factor under *Cohen* received a careful analysis in Gulfstream's opening brief (at pp. 13-15). All Mayacamas says, however, is that the ruling below "is more inherently tentative, and similar to a refusal to certify a class . . . ," because "any number of circumstances could change in such a way as to justify the federal court's surrender of jurisdiction." (Resp.Br., p. 7) Gulfstream will avoid the temptation to repeat the arguments it has already made on that point under *Moses Cone Hospital*. Mayacamas has not responded to those arguments, and there is no need to supplement them.

Later, in addressing the importance factor under *Cohen* (at pp. 8-9), Mayacamas completely ignores Gulfstream's principal argument—the *public* importance of avoiding unnecessary frictions between the federal and state courts. Mayacamas purports to address Gulfstream's argument by denying (at p. 8) that Gulfstream has suffered any "procedural disadvantage." Gulfstream, however, has squarely argued that private procedural advantages and disadvantages are irrelevant when assessing the importance of an issue for *Cohen* appealability.

Next, Mayacamas attempts to distinguish *Local No. 438 v. Curry*, 371 U.S. 542 (1963), and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), on the grounds that the district courts there "had precluded a party from litigating in a forum which is favored by federal policy." (Resp.Br., p. 9) Mayacamas reasons that, in the instant case, "no courthouse doors have been

closed." (*Id.*) This is true, but it completely misses the point. The contention in the instant case is that a courthouse door *should* have been closed. That is what *Curry* and *Langdeau* held, and for analogous reasons of federal policy. There, as here, important federal policies were being frustrated by a litigant's forum selection. Here, the pertinent federal policy called for an adjudication of the parties' dispute in the state court alone.

Mayacamas only briefly touches on the availability of an appeal after final judgment, and on the "protected interest" concept as a threshold requirement for *Cohen* appealability. (Resp.Br., pp. 9-10) It will suffice here to refer to Gulfstream's discussions on those points at pages 15-17 and 6, respectively, in its opening brief. Once again, Mayacamas neither mentions nor responds to Gulfstream's contentions and authorities.

Similarly, in discussing appellate jurisdiction under the *Enelow/Ettleson* doctrine, Mayacamas asserts that there was no equitable "defense" interposed herein—merely an equitable "consideration"—because the district court was simply "asked to stay its proceedings as an exercise of discretion in the control of its calendar." (Resp.Br., p. 12) This approach ignores (1) Gulfstream's principal contention on the appeal, that the stay was not freely discretionary, but required by an important federal policy; and (2) Gulfstream's specific contentions regarding *Enelow/Ettelson*. It is one thing, for example, to frame a reasoned rebuttal to Gulfstream's point (at pp. 19-20) that it is a defense to a lawsuit to demand that it be dismissed, or alternatively that it be stayed pending the final resolution of a prior pending action. It is another thing simply to assert the contrary, even with citations to several Courts of Appeals. For this Court may well be resolving a Circuit conflict on this issue, and Mayacamas makes no comment at all on Gulfstream's policy discussion (at pp. 17-18).

Finally, Mayacamas' brief includes a discussion of the mandamus issue (at pp. 13-15), but it begs every material point raised by Gulfstream (at pp. 20-23). It does not even mention *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), let alone attempt to distinguish that primary authority in Gulfstream's brief. Instead, Mayacamas submits a catalogue of generalizations about the writ of mandamus, and a conclusory assertion that the

ruling below was a freely discretionary one. Gulfstream's arguments on mandamus are simply dismissed as "desperate" [sic] (Resp.Br., p. 15), based on a single and unsupported sentence following Mayacamas' gratuitous comment.

(B) The Substantive Issues

In the substantive portion of its brief, Mayacamas does respond more directly to Gulfstream's contentions. Some it mischaracterizes, however—as where it has Gulfstream seeking "a new abstention doctrine" (Resp.Br., p. 18), or contending that Mayacamas' failure to remove is the sole factor of significance. (*Id.*, p. 17) To the contrary, Gulfstream has invoked the established *Colorado River* doctrine, not any new one; and it has argued that the removal factor is significant because of its concurrence with other factors, primarily, the complete identity of parties and issues in both lawsuits, and the lack of involvement of any federal law. Gulfstream has never argued that a failure to remove raises a *per se* bar to a subsequent federal lawsuit. This is an unusually stark case, and Gulfstream seeks an appropriately narrow holding.

Nevertheless, Mayacamas does take direct issue with Gulfstream's evaluation of the removal factor. Mayacamas contends that it is "inconsequential . . . , beyond the scope of either the *Colorado River* doctrine or principles of abstention" (Resp.Br., p. 18); that the removal statutes have the limited purpose of protecting out-of-state defendants from local prejudices, not of avoiding federal-state frictions; and that any such purpose on the part of the Framers "is of dubious relevance in today's world of modern interstate commerce." (*Id.*, p. 25) Mayacamas also argues that it would be unfair to restrict a litigant in its position to the local removal venue, especially when personal jurisdiction in that venue is being challenged. (*Id.*, p. 27)

Gulfstream can reply briefly to Mayacamas' contentions. Although they are responsive, they are readily dispatched.

Mayacamas concedes that the federal abstention doctrines were developed out of "concerns of comity and state-federal relations. . . . " (Resp.Br., p. 18) Mayacamas also concedes that *Colorado River Water Conservation Dist. v. United States*, 424

U.S. 800 (1976), "shares many of the same concerns, and serves many of the same purposes. . . ." (Resp.Br., p. 20). After all, *Colorado River's* emphasis on the limited scope of the "wise judicial administration" doctrine rested explicitly on "the absence of weightier considerations of constitutional adjudication and state-federal relations. . . ." 424 U.S. at 818. The latter concerns are present here.

It is difficult, therefore, to take Mayacamas seriously when it dismisses the removal factor as "beyond the scope of either the *Colorado River* doctrine or principles of abstention." (Resp.Br., p. 18) *Colorado River* holds that a federal statutory policy can give rise to an "exceptional circumstance" warranting the refusal to exercise federal jurisdiction. Where such a policy involves federal-state comity itself, that would seem to clinch the argument for an "exceptional circumstance." It hardly takes the case outside the scope of the entire *Colorado River* doctrine.

So the question becomes one of legislative intent and federal policy. Mayacamas says Gulfstream "provides no support" (Resp.Br., p. 25) for a legislative purpose to reduce federal-state conflicts and tensions through the removal process. But Gulfstream did provide such support, both historical and analytical. Mayacamas simply does not meet Gulfstream's case. Its only responsive argument is that the removal statutes have the purpose of neutralizing local prejudices. One purpose does not exclude the other, however, and there is convincing evidence of a purpose to avoid the phenomenon of diversity actions proceeding concurrently with an identical and prior pending state court suit between the same parties.

In addition to ignoring or denying the historical evidence adduced by Gulfstream, Mayacamas contends that the diversity jurisdiction statute would be "superseded" by Gulfstream's analysis of the intent of the removal statutes. (Resp.Br., p. 25) Mayacamas argues that there must be express statutory language authorizing the stay or dismissal of the instant diversity action.

The short and sufficient answer to Mayacamas' argument is that the various statutes conferring subject matter jurisdiction have never been found to preclude "traditional" or *Colorado River* abstention. They simply confer jurisdiction. Independent principles and policies, some but not all reflected in statutes, govern the exercise or nonexercise of that jurisdiction. For example, *Colorado River* held that the McCarran Amendment did not diminish subject matter jurisdiction under 28 U.S.C. §§ 1331 or 1345, but was nonetheless the dispositive factor in the refusal to exercise that jurisdiction. The same analysis applies in this case to the diversity and removal statutes.

Mayacamas also suggests that the Framers' concerns, if any, about federal-state relationships are "of dubious relevance in today's world of modern interstate commerce." (Resp.Br., p. 25) Mayacamas offers no support for this striking notion, or for its premise that the documented intent of a statute can be disregarded by the judiciary on the basis of "modern" conditions. In any event, Gulfstream's opening brief documented this Court's continuing concern for avoiding unnecessary federal-state frictions. Mayacamas' point is frivolous for a number of reasons.

Finally, when Mayacamas turns to the practical aspects of this issue, it makes two related arguments: that removal is more harmful to federal-state relationships than duplicative lawsuits; and that it would be unfair to litigants in Mayacamas' position to bar them from filing reactive diversity suits in their venues of residence. Both of these arguments are readily countered.

Mayacamas takes duplicative federal litigation as a right, as something completely acceptable as a matter of federal policy. The basis for that premise, when articulated at all, is the Court's statement in *Colorado River* that, "*Generally*, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction . . .' " 424 U.S. at 817 (emphasis added). As Gulfstream has already argued extensively, however, there is a reason for that general rule, and the reason does not obtain here. Although the federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them," 424 U.S. at 817, here there was a preferred method for Mayacamas to invoke that jurisdiction. It did not do so, and instead created duplicative litigation of the very sort the Framers feared, and sought to avoid through the removal process.

Removal takes a nascent state court action into the local federal district, in most instances eliminating any chance of conflicts and tensions between the two forums. It is a swift and relatively painless way of securing the nonresident defendant's paramount right to a federal adjudication. And effective remedies are available should the local venue be deemed wrong or inappropriate. See, 28 U.S.C. §§ 1404(a) and 1406(a).

Removal is also designed to give litigants in Mayacamas' position the absolute right to a federal forum. Mayacamas even concedes that Georgia was "not necessarily inconvenient enough to successfully transfer the case on forum non conveniens grounds." (Resp.Br., p. 27) Mayacamas is therefore in no position to cry foul. The only "right" to be lost is the ability to create "duplicative litigation, tension and controversy between the federal and state forums, [and] hurried and pressured decisionmaking,'" *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 569 (1983)—"an unseemly and destructive race to see which forum can resolve the same issues first. . . ." *Id.* at 567.

Even though Mayacamas spurned removal, however, it is hardly being punitive to restrict it to a competent state court forum. There has been no complaint on that score. Mayacamas urges that *in personam* jurisdiction is lacking in Georgia, although the Georgia courts so far disagree. If the dispute ultimately could not be adjudicated there, however, a federal court stay would expire by its terms, or the action would be refiled if it had been dismissed. There is no unfairness here, and certainly not enough to counterbalance the many reasons for avoiding Mayacamas' duplicative federal action.

CONCLUSION

For all the foregoing reasons, Mayacamas' brief does not undermine Gulfstream's contentions in this case. The relief prayed for in the opening brief should therefore be granted.

Respectfully submitted,

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